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[fol. 1] **IN SUPREME COURT OF PENNSYLVANIA**

MISCELLANEOUS DOCKET No. 9

No. 152

COMMONWEALTH OF PENNSYLVANIA ex rel. EDWARD GIBBS

vs.

C. J. BURKE, Warden, Eastern State Penitentiary

DOCKET ENTRIES

May 24, 1948, Petition for writ of habeas corpus filed.
Edward Gibbs.

ORDER

June 21, 1948, a rule is hereby directed to issue against C. J. Burke, Warden, Eastern State Penitentiary, and the District Attorney of Delaware County, calling upon them, or either of them, to show cause why the prayer of the within petition should not be granted; rule returnable June 3, 1948.
By the Court, Stearne, J.

June 24, 1948, Warden's Answer filed.
June 29, 1948, Acceptance of service of rule by the District Attorney filed.
July 2, 1948, District Attorney's Answer with
Transcript No. 149 Sept. Sessions, 1947
Bill of Indictment No. 417 September Sessions, 1947
Certificate of Clerk etc.
Notes of Testimony,
filed.

ORDER

July 6, 1948. Writ denied.
Per Curiam.

July 9, 1948. Record exit and sent to District Attorney, Delaware County.
[fol. 2] July 9, 1948. Acknowledgment received and filed.
November 18, 1948, the following order has been received from the Clerk of the Supreme Court of the United States

on petition for writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania:

"On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 418.

November 15, 1948."

[fol. 3] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION FOR WRIT OF HABEAS CORPUS—Filed May 24, 1948

To the Honorable, the Chief Justice and associate Justices of the said court:

The Petitioner of namely Edward Gibbs, Relator in the above named actions respectfully represents:

1. That the said Edward is now an inmate of the Eastern State Penitentiary, Graterford, Montgomery County, Pennsylvania.

2. That on the 17th day of July, 1947. He was arrested and presented before the Honorable John McCaffery, Esq., a Justice of the Peace in the borough of Marcus Hook, Delaware County, Pennsylvania, upon a warrent sworn duely to by one James Blades of 708 Market Street, in the borough of Marcus Hook, Delaware County, Pennsylvania. Accusing said Edward Gibbs with the crime of larceny and receiving stolen property.

[fol. 4] 3. That on the 17th day of July, 1947. At a hearing before the aforementioned Justice of the Peace, he Edward Gibbs entered a plea of not guilty to the aforesaid charges, and was committed to the Delaware County Prison at Thornton, Delaware County, Pennsylvania in default of Five Hundred Dollars Bail.

4. That on September 30th, 1947. He Edward Gibbs was presented to the Court of Common Pleas 32nd, Judicial

District of Pennsylvania, in the city of Media, Delaware County, Pennsylvania.

5. That on September 30th, 1947 he Edward Gibbs entered a Plea of not guilty to Indictment Number 417 September Session, to the charge of larceny and receiving stolen property.

6. That he Edward was denied counsel and through ig-orance of law and fact was forced to act as his own counsel.

7. That on September 30th, 1947 He Edward Gibbs was found guilty by the Jury on the count of larceny, and was sentenced to a term of two and one half years to five years, in the Eastern State Pen-tentiary, Philadelphia, at which institution he is now an inmate.

8. That he Edward Gibbs was denied his constitutional Rights as set forth in the Ten Or-ginial Ammendsments, Article VI.

8-A. That he the said Edward Gibbs is now being detained il-egally in the Eastern State Pen-tentiary Philadelphia, Pennsylvania.

[fol. 5] 9. That the Honorable Justice Harold L. Ervins 'Erred' when he pointed out to the jury that he your Relator was not represented by counsel, which he thought was perfectly legal in the State of Pennsylvania.

Wherefore, Your Petitioner prays that allowances of a Writ of Habeas Corpus from your Honorable Court be granted, and that Edward Gibbs be brought before your Honorable Court for further consideration on the charge against him.

And he will ever pray,

(Signed) Edward J. Gibbs.

Duly sworn to by Edward J. Gibbs. Jurat omitted in printing.

[fol. 6] COURT OF COMMON PLEAS 38TH JUDICIAL DISTRICT OF PENNSYLVANIA, MONTGOMERY CO.

Chambers of George C. Corson, Judge

Norristown, Pa., February 26, 1948.

Edward Gibbs, D-9954,
Box 244,
Graterford, Penna.

DEAR SIR:

Your registered envelope containing the enclosed petition for Writ of Habeas Corpus, was received by Judge Knight and turned over to me for action.

We are returning it to you, first, because the prothonotary required costs in the amount of, I believe $3.50 for filing, and, second, because I feel it would be a waste of money for you to pay the costs to have this petition filed.

Assuming that the facts as set forth are correct, you are at present in the Penitentiary as a result of a commitment from the Delaware County court. While your physical presence in Montgomery County might give us jurisdiction to issue the Writ, yet the only thing that would happen would be that the Warden would present his commitment and we would not be able to go behind the commitment for any reason except possibly lack of jurisdiction in the Delaware County Court. Since your petition shows this court to have jurisdiction, the Writ would have to be dismissed. If you wish to raise the question set forth in paragraph 9 of your petition, I would suggest that you petition the Superior Court which has state wide appellate jurisdiction. However, if you insist upon having the Writ heard in this county, if you will forward the petition and sufficient money to pay for filing, we will consider at that time whether or not there is sufficient — set forth to warrent the issurance of the Writ.

Very sincerely yours, (S.) George C. Corson

ENDORSEMENT

No. 152 Miscl. Docket No. 9 M.P. 1476 Commonwealth of Pennsylvania ex rel Edward Gibbs vs. C. J. Burke, Warden Eastern State Penitentiary. Petition for Writ of Habeas Corpus *Order* June 21, 1948, a rule is hereby directed to

issue against C. J. Burke, Warden, Eastern State Penitentiary, and the District Attorney of Delaware County, calling upon them, or either of them to show cause why the prayer of the within petition should not be granted; rule returnable July 3, 1948. By the Court, Stearne, J. Filed in Supreme Court May 24, 1948. Philadelphia—Order—July 6, 1948, Writ denied. Per curiam.

[fols. 7-8] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ANSWER OF C. J. BURKE, WARDEN, EASTERN STATE PENITENTIARY—Filed June 24, 1948

To the Honorable, the Judges of the Superior Court:

C. J. Burke, Warden, Eastern State Penitentiary, Philadelphia, Pa., respectfully represents:

That Edward Gibbs pleaded guilty to Bill of Indictment No. 417, September Term, 1947, Delaware County, Pa., to the surcharge of Larceny, and was sentenced by the Hon. Harold L. Erwin on the 30th day of September, 1947 to undergo imprisonment in separate or solitary confinement at labor, in the State Penitentiary for the Eastern District of Pennsylvania for a period of not less than two and one-half (2½) years nor more than five (5) years to be computed from July 17, 1947. Minimum expires on January 17, 1950, and the maximum expires on July 17, 1952.

I am attaching photostatic copies of both commitments.

Respectfully, (S.) C. J. Burke, Warden

Duly sworn to by C. J. Burke. Jurat omitted in printing.

[fol. 9] Court of Oyer and Terminer, General Jail Delivery, and Quarter Sessions of the Peace, for the County of Delaware, September Term, 1947

No. 417

The Commonwealth of Pennsylvania,

vs.

Edward Gibbs

Sur Charge of Larceny.

Sep. 30, 1947 Defendant Pleaded Guilty.

I Certify, That on the 30th day of September, A. D. 1947 the above-named defendant is adjudged by the Court to pay a fine of Ten Dollars to the commonwealth, undergo imprisonment in separate or solitary confinement at labor, in the State Penitentiary for the Eastern District of Pennsylvania, for a period of not less than Two and one-half years nor more than Five years to be computed from July 17, 1947, to be there fed, clothed, and in all respects treated as the law directs; that he pay the costs of prosecution, and stand committed until judgment be fully complied with.

In witness whereof, I have hereunto set my hand and Seal of said Court, this 30th day of Sept. A. D. 1947.

(S.) John Rickerts, Pro. Clerk

[File endorsement omitted.]

[fol. 10] In the Supreme Court of Pennsylvania

[Title omitted]

Answer to Petition for Writ of Habeas Corpus—Filed July 2, 1948

To the Honorable, the Chief Justice and Associate Justices of the Said Court:

The Answer of the Commonwealth to the Petition for Writ of Habeas Corpus by the above-named Relator, Edward Gibbs, respectfully represents:

1. Admitted.
2. Admitted.

3. Admitted.
4. Admitted.
5. Admitted.
6. Denied. It is denied that he, Edward Gibbs, was denied counsel and through ignorance of law and fact was forced to act as his own counsel. On the contrary, it is averred that he appeared and acted as his own counsel, conducted his defense, cross-examined the Commonwealth's witnesses and fully acted as his own counsel.
7. Admitted.

[fol. 11] 8. By way of answer it is averred that the record discloses the relator was arrested on July 17, 1947, and immediately thereafter a transcript of the hearing before the Justice of the Peace was returned to the Clerk of Courts of Delaware County on the 22nd day of July 1947. A bill of indictment was presented to the September Sessions of the Grand Jury inquiring for the County of Delaware on September 16, 1947 and a true bill was found on said date. The relator was thereafter called for trial on September 30, 1947. The transcript of the notes of testimony taken in the matter does not disclose that the relator demanded counsel nor requested that counsel be appointed to represent him. The notes of testimony in the record of the case disclose that the relator cross-examined each witness for the Commonwealth and presented a defense on his own behalf to the charges involved which in brief were that the relator entered the room of James Norris Blades on the 17th day of July 1947 and removed therefrom a wrist watch of the value of twenty dollars, clothing of the value of fifty-four dollars and fifty cents, a camera valued at twelve dollars, a radio valued at thirty dollars, a suitcase, and seaman's papers. At the time of his arrest the relator was wearing some of the prosecutor's clothing, and the wallet of the prosecutor was found in the jail cell in which he, the relator, had been lodged on his arrest and in his cross-examination of the witnesses he disclosed that the wallet had been placed therein by himself but not hidden. The relator was seen to enter the room of James Norris Blades, whom he knew well, by the mother of the victim. The record discloses that the relator was arrested the same [fol. 12] day that the larceny occurred. Witnesses also identified the relator as having pawned the radio and offering an additional portion of the goods which had been

taken. The relator was found guilty of the charge of larceny and sentence followed in due course. By way of further answer it is averred that the relator herein is undertaking to substitute a Writ of Habeas Corpus for an appeal. The issues here presented by the relator were before your Honorable Court in the matter of *Comth. ex rel. Uveges, v. Ashe, Warden,* and the opinion therein rendered, *161 Pa. Superior Ct. P. 58,* clearly holds that the Petition for Writ of Habeas Corpus cannot be made a substitute for appeal; that he was not denied his constitutional rights under the averments as set forth in his petition for said writ.

It is also averred by way of answer that the relator's examination of witnesses and questions asked during the course of the trial fully disclosed his familiarity with legal process in the criminal courts. At the time of sentence and after the verdict was returned the criminal record of this relator was brought to the attention of the Court. This criminal record is attached hereto, made a part hereof and marked Exhibit "A".

8-A. It is admitted that Edward Gibbs, the relator is being detained in the Eastern State Penitentiary pursuant to sentence imposed by the Hon. Harold L. Ervin, Judge of the Court of Oyer and Terminer and General Jail Delivery and Court of Quarter Sessions of the Peace of Delaware County, Pennsylvania. On September 30, 1947, the following sentence was given the accused:

> "And now to wit 9/30/47 the within named defendant is sentenced by the Court as follows, 'Pay a fine of $10, undergo imprisonment in the Eastern State Penitentiary at separate and solitary confinement for a period of 5 years Maximum and 2½ years Minimum. Sentence to date from commitment July 17, 1947 and stand committed until this sentence be complied with'."

[fol. 13] It is denied that he is illegally detained therein.

Wherefore, it is prayed that the Petition for Writ of Habeas Corpus be dismissed and the relator remanded to the Eastern State Penitentiary for the completion of sentence imposed as set forth above.

Respectfully submitted, (Signed) Karl W. Johnson, First Assistant District Attorney; (Signed) C. Wm. Kraft, District Attorney.

[fol. 14] *Duly sworn to by Karl W. Johnson. Jurat omitted in printing.*

[fol. 15] EXHIBIT "A" TO ANSWER

Report of Probation Officer

Commonwealth vs. Edward John Gibbs, No. — Sessions, 194-.

Alias —— ——.

Address: 1360 Market St., Linwood, Pa.

Age, 34. Birthday, 8-10-12. Color, white. Nationality, American. Height 5-9¼. Weight, 248. Where born, Linwood, Pa. Married, single. Family, Mother, 2 bros., 2 sis.

Employment: Rigger—General Chemical Co. Earnings: $54. per wk.

Arrested —— — 194- in Marcus Hook, Pa.

Arrested by —— — —.

Arrested with —— — —.

Charged with Larceny (clothing, radio, etc.)

Committed July 18, 1947 by ——.

Prosecutor, —— ——. Address, —— ——.

In Jail ——. Bail ——. Surety ——.

Tried —— — 194- before —— —— Judge.

Convicted: Plead Guilty.

Sentenced —— — 194- to pay fine of $——, costs and ——.

Minimum Sentence Expires —— — ——.

Fine $——. Paid —— ——. Costs $—— Paid —— ——.

Defendant has no disease and his conduct has been satisfactory except

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 418

EDWARD GIBBS, PETITIONER,

vs.

C. J. BURKE, WARDEN, EASTERN STATE PENITENTIARY, PHILADELPHIA, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1948.

CERTIORARI GRANTED NOVEMBER 15, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 418

EDWARD GIBBS, PETITIONER,

vs.

C. J. BURKE, WARDEN, EASTERN STATE PENITENTIARY, PHILADELPHIA, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JAN. 20, 1949.

Past Record

210 Dec. Sess. 1928, 1-9-29 found guilty of B & E & L & R S G. 1-11-29. $200 and costs, 1 to 2 yrs. Co. Jail, Judge Fronefield.

269 Sept. Sess., 1928, Oct. 5, 1928 found not guilty of A A&B with int. to kill. Pay costs, Judge MacDade.

158 Dec. Sess. 1928, 12-28-28 found not guilty of larceny of chickens, Judge Fronefield.

1930, arrested in Marcus Hook, Pa., charged with corner lounging, Disch. by Mgst.

264 Mar. Sess. 1931, 3-17-31 plead guilty to larceny. $100 and costs, 1 to 2 yrs. in Co. Jail by Judge MacDade.

109 Sept. Sess. 1932, 10-4-32 found guilty, L & R S G. $50 and costs, 6 mos. to 3 yrs. in Co. Jail, Judge Morrow.

5-4-34, arrested in Marcus Hook, Pa., charged with A&B, hit and run and oper. intox. 5-9-34, discharged by Mgst. Williamson.

461 Sept. Sess. 1934, 8-29-34 arrested in Marcus Hook, Pa., charged with larceny. 10-5-34, found guilty, $100 and costs, 6 mos. to 3 yrs. in Co. Jail by Judge Fronefield. (1-10-36 sent. to 1 yr. in Co. Jail for Viol. of Parole by Judge Fronefield.)

274 Dec. Sess. 1935, 10-17-35 arrested in Marcus Hook, Pa., charged with larceny. 1-17-36, found not guilty of L & R S G. See 461 Sept. Sess. 1934 for Viol. Parole by Judge Fronefield.

262 June Sess. 1937, 3-9-37 arrested in Marcus Hook, Pa., charged with lar. of auto. 6-7-37 ignored by Grand Jury.

279 Sept. Sess. 1937, 6-5-37 arrested in Marcus Hook, Pa., charged with R S G. 10-18-37 plead guilty, $10 and costs, 1 to 3 yrs. in Co. Jail, sen. susp., paroled for 3 years, Judge MacDade.

Aug. 1938 arrested in Marcus Hook, Pa., charged with being drunk, sent. to 15 days in Co. Jail by Mgst. O'Donnell.

Aug. 1938, arrested in Marcus Hook, Pa., charged with being drunk, Sent. to 15 days in Co. Jail by Mgst. Imburgia.

187 Dec. Sess. 1938, arrested 10-3-38 in Marcus Hook, Pa., charge lar. 1-3-39, found guilty, $50 and costs and rest., 1½ to 3 years in Co. Jail by Judge Crichton.

451 Mar. Sess. 1947, arrested 12-3-46 in Marcus Hook, Pa., charge burglary, 3-17-47, found not guilty, Judge Ervin.

452 Mar. Sess. 1947, charge larceny. 3-17-47 found not guilty, lar. Pay costs, directed verdict not guilty R S G., Judge Ervin.

453 Mar. Sess. 1947, charge Poss. burg. tools. 3-17-47, found not guilty. Pay costs, Judge Ervin.

ntd.

Endorsement: 722. No. — 19—. Commonwealth vs. Edward J. Gibbs. Report of Probation Officer.

[File endorsement omitted.]

[fol. 16] In the Supreme Court of Pennsylvania

[Title omitted]

Acceptance of Service of Certificate of Rule—Filed June 29, 1948

May 24, 1948. Petition for writ of habeas corpus filed.

Edward Gibbs.

Order

June 21, 1948. A rule is hereby directed to issue against C. J. Burke, Warden, Eastern State Penitentiary, and the District Attorney of Delaware County, calling upon them, or either of them, to show cause why the prayer of the within petition should not be granted; rule returnable July 3, 1948.

By the Court, Stearn, J.

True Copy from Record.

In Testimony Whereof, I have hereunto set my hand and the seal of said Court, at Philadelphia, this twenty-second day of June, 1948.

(Signed) C. A. Waters, Prothonotary. (Seal.)

[File endorsement omitted.]

Certificate of Rule

June 24, 1948.

Service is hereby accepted of the within Certificate of Rule.

(S.) C. Wm. Kraft, District Attorney, Delaware County, Media, Pa.

[fol. 16a] Clerk's Certificate to following transcript omitted in printing.

[fol. 17] IN THE COURT OF QUARTER SESSIONS FOR THE COUNTY OF DELAWARE, STATE OF PENNSYLVANIA

No: 149, Sept. Sessions 1947

DOCKET ENTRIES

Harold L. Ervin, Judge

COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD GIBBS

September 16, 1947. Deft. indicted for Larceny & R S Goods. True Bill.

September 30, 1947. Deft. plead Not Guilty to Larceny—2nd Count R. S. Goods withdrawn.

Eo Die. Jury called and sworn who returned verdict of Guilty as to Larceny.

Eo Die. Deft. sentenced to pay $10.00 fine and costs and imprisonment in Eastern State Penitentiary for a period of 2½ years min. to 5 years Max. from commitment July 17, 1947.

Eo Die. Clerk's certificate filed.

October 16, 1947. Transcript of testimony of trial September 30, 1947, lodged.

November 19, 1948. Copy of petition for writ of Certiorari to the Supreme Court of Penna., from the Supreme Court of the United States (127 Misc. Oct. Term 1948). Case transferred to the Appel-ate Docket as of #418 (Forma Pamperis), filed.

[fol. 18] IN THE COURT OF QUARTER SESSIONS OF THE PEACE OF THE COUNTY OF DELAWARE, PENNSYLVANIA

INDICTMENT

COUNTY OF DELAWARE, SS:

The Grand Inquest of the Commonwealth of Pennsylvania, inquiring for the County of Delaware, upon their respective oaths and affirmations, do present, That Edward Gibbs late of the said County yeoman on the 17th day of

July in the year of our Lord one thousand nine hundred and forty-seven at the County aforesaid, and within the jurisdiction of this Court, with force and arms, etc. a suitcase containing clothing, a watch, a camera, and a radio altogether of the value of One Hundred Twenty One Dollars and Fifty-Cents ($121.50) of the goods and chattels, moneys and property of James Blades then and there being found then and there feloniously did steal, take and carry away contrary to the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, That the said Edward Gibbs afterwards, to wit: on the same day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, with force and arms, &c., the goods and chattels, moneys and properties aforesaid, by some ill-disposed person (to the Jurors aforesaid yet unknown) then lately before feloniously stolen, taken and carried away, feloniously, unjustly, and for the sake of wicked gain did receive and have, the said Edward Gibbs then and there well knowing the goods and chattels, moneys and properties last mentioned to have been feloniously stolen, taken and carried away, contrary to the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

(S.) C. Wm. Kraft, District Attorney.

No. 417, September Sessions, 1947. Commonwealth vs. Edward Gibbs. 1st Count—Larceny. Penal Code 1939, P. L. 872, § 807, 808; (18 P. S. Supp. § 4807, § 4808). 2nd Count—Receiving Stolen Goods. Penal Code 1939, P. L. 872, § 817; (18 P. S. Supp. § 4817) withdrawn. Felony. True Bill. (S.) Chas. L. Smith, Foreman. Sep. 16, 1947. The Defendant, being arraigned, pleads Not Guilty. (S.) Edward J. Gibbs, Dist. Atty. sim. et issue. Verdict —— —— 19—. Transcript No. 149.

Witnesses: James Blades, Prosecutor; Mary Lafield, Ernest Fleming.

Bail, $——. Jail. MAM.

[fol. 19] IN THE COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY AND COURT OF QUARTER SESSIONS OF THE PEACE OF DELAWARE COUNTY, PENNSYLVANIA

COMMONWEALTH

vs.

EDWARD GIBBS

SWEARING OF JURY, PLEA OF NOT GUILTY, VERDICT AND SENTENCE

No. 417, Sept. Sessions, 1947. Transcript No. 149. Jury called and sworn 9/30/1947 (Date). 9/30/1947 (Date) Plea Not Guilty. Verdict 9/30/1947—Guilty of Larceny.

Indictments

Reported by M. Fenix Cornwall, Official Stenographer.
Larceny & R. S. Goods withdrawn.
Court No. 2. Above is certified as correct.

(S.) John Rickerts, Deputy Clerk.

Sentence: And now to wit 9/30/1947 the within named deft. is sentenced by the Court as follows: 1—To pay all costs √; 2—Pay fine of $10; 3—Undergo imprisonment in the Eastern State Penitentiary at separate and solitary confinement for a period of 5 yrs. Maximum and 2½ yrs. Minimum. Sentence to date from commitment July 17, 1947 and stand committed until this sentence be complied with.

Judge Ervin, Court Room #2—JR, Clerk. (Seal.)

(S.) K. Johnson, Ass't District Attorney. None, Counsel for Defendant.

(S.) H. L. Ervin, Judge.

Filed 9/30/47. (S.) J. Y. Deputy Clerk.

[fol. 20] RECORD OF PROCEEDINGS BEFORE JUSTICE OF THE PEACE

Transfer from the Docket of W. Harlan McCafferty, Justice of the Peace.

On the 17th day of July, A. D. 1947, personally appeared before me W. Harlan McCafferty, a Justice of the Peace, in and for the said County, James Blades, who being duly [affirmed] [sworn] according to law deposes and says upon information received from —— which he believes to be true and expects to be able to prove, upon personal knowledge that Edward Gibbs on the 17th day of July, A. D. 1947, and within the past two years in the Boro. of Marcus Hook, County of Delaware, Commonwealth of Pennsylvania, did on or about the hour of 10:15 A. M. at 710 Market St., Marcus Hook, Pa., did violate Section 807 of The Penal Code of the Commonwealth of Penna. by committing larceny at a house located at 710 Market St., Marcus Hook, Pa., taking the following articles a watch valued about $20.00, clothing valued about $54.50, a camera valued about $12.00, radio valued about $30.00, suit case valued about $5.00 and se-man papers, contrary to the form of the Act of Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

(S) James N. Blades, (S) W. H. McC. (Seal)

[Sworn] [Affirmed] and subscribed to before me this 17th day of July, A. D. 19—, at Marcus Hook, Delaware County, Penna.

[Seal] (S) W. Harlan McCafferty, Justice of the Peace.

My commission expires 1st Mon. Jan., 1950.

Commonwealth of Pennsylvania vs. Edward Gibbs. No Address —.

Warrant issued to Ernest Fleming on the 17th day of July, A. D. 1947 on oath of James Blades.

And now, July 17, 1947 Defendant brought up for hearing. James Blades (sw) said: When I came home I went to my room, and I told my mother that she must have done a real cleaning job that she put away the radio, clothe- and everything. She said the only thing she did was to make the bed. I told her the radio was gone, and she said Edward

Gibbs was here looking for you. I went for an Officer. He took a radio valued about $30.00, clothing valued about $54.50, camera valued about $12.00, watch valued about $20.00, suit case valued about $5.00 and se-man papers. [fols. 20a-21] Officer Fleming's and myself went to Chester to look for Gibbs. We found all the thing in a pawn shop at 141 W. 3rd St., Chester, Pa., except the watch which was on his wrist at the time of his arrest. We found him in Hill's Grill, 223 Edgmont Ave., Chester, Pa., at that time he was wearing my hat. I took the hat off his head.

Mrs. Mary Layfield (sw) said: Mr. Edward Gibbs was in my home on July 17, 1947 at about 9:30 A. M. I was cleaning when he came in the hall. He asked if he could go up and get Jim. I told him Jim went out. I was cleaning and I asked him to go out. He said he would like to use the bath room. I told him alright, but not to stay in there. When he went up he looked in Jim's room as he went by and I suspicioned him. I shut Jim's door and walked to the other hall. When I came back he was standing looking at Jim's door, and I asked him if he was through with the bath room. He said he was and I told him to get out. He went out. I was getting lunch and heard someone walking around upstairs. I thought it was Mr. Bennett. When Jim came home he missed his things. My radio was gone and I said it must have been Ed Gibbs.

Officer Fleming (sw) said: On or about 1:00 P. M. July 17, 1947 I received a complaint from James Blades about clothe- and radio being gone. The radio wire had been cut loose from the radio and there were clothing laying on the floor. Mr. Blades and myself went to Chester to look for Gibbs and to find out if the things had been pawned. I went to Joe's pawn shop and Edward Gibbs had been there, with some articles but refused to accept them. He described him to us. We went to 141 W. 3rd St., and the owner said he had them. He gave me the description of them. He gave us his age, weight and height, and how he was dressed. He gave him $8.00 for the things. I found him in Hill's Grill at 223 Edgmont Ave., Chester, Pa. I placed him under arrest and he had Jim Blades watch and hat on.

Defendant refused to testify.

After hearing, defendant required to give bail in the sum of $500.00, conditioned for his appearance at the next term of Court.

Defendant committed July 17, 1947 in default of $500.00 bail.

The following persons each tent in sum of $—— to appear and testify at said term of Court:

Witness:

James Blades, 710 Market St., Marcus Hook, Pa.
Mrs. Mary Layfield, 710 Market St., Marcus Hook, Pa.
Ernest Fleming, 221 Market St., Marcus Hook, Pa.

Upon inquiry, defendant gave as persons to be notified of trial, None.

I hereby certify that the above is a correct transcript from my docket. Witness my hand and seal this 22nd day of July, A. D. 1947.

(S) W. Harlan McCafferty, Justice of the Peace.
(Seal).

[fols. 21a-22] [Endorsed:] Criminal Transcript. No. 149. Sept. Sess. 1947. From W. Harlan McCafferty, Justice of the Peace, Alderman, 1018 Washington St., Marcus Hook, Pa. Commonwealth of Pennsylvania vs. Edward Gibbs. No Address. 1360 Market Street, Linwood, Pa. Sur Charge: Larceny. Constable: Ernest Fleming, 221 Market St., Marcus Hook, Pa. Filed 7-23-47. (S.) W. J. D., Clerk of Courts.

Instructions to Justices of the Peace and Alde man

1. In Larceny cases state what goods were stolen, the value thereof, and the owner thereof.

2. In cases of Plain Assault and Battery be certain that the defendant is heard or afforded an opportunity to be heard and that your transcript shows what occurred.

3. In Rape cases show age of the female alleged to have been raped.

4. In cases of Burglary and Breaking and Entering, state definitely whether the building entered was a dwelling, and whether the breaking and entering occurred in the day time or night time.

5. In Fornication and Bastardy cases state the sex of the child and date of its birth, and also the approximate date of the commission of the act of fornication.

6. In cases of False Pretense set out fully what was falsely pretended.

7. In cases of Failure to Stop and Render Assistance, give the name of the person killed or injured, or, if no person was killed or injured, give the name of the person whose vehicle was damaged.

8. Be certain that:

(a) On the copy of the Information you have filled in the name of the prosecutor and your own name and seal.

(b) On the bottom of the transcript you have signed your name and attached your seal.

(c) On the recognizance you required all persons entering bail to justify properly.

9. A married woman may not go bail for any defendant.

10. Property owned jointly by husband and wife may not be accepted as bail.

[fol. 23] IN THE COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY AND QUARTER SESSIONS OF THE PEACE IN AND FOR THE COUNTY OF DELAWARE, PENNSYLVANIA, SEPTEMBER SESSIONS, 1947

Court Room No. 2

No. 417

COMMONWEALTH OF PENNSYLVANIA

vs.

EDWARD GIBBS

Transcript of Trial Proceedings

Media, Pa., September 30, 1947.

Before Ervin, J., and a Jury

Karl W. Johnson, Esq., for Commonwealth.

ARRAIGNMENT AND PLEA

(Defendant arraigned and pleads not guilty.)

(Jury sworn.)

(Opening by Mr. Johnson.)

JAMES NORRIS BLADES, Sworn.

By the Clerk:

Q. Give your full name.
A. James Norris Blades.

[fol. 24] By Mr. Johnson:

Q. Where do you live, Mr. Blades?
A. 710 Market Street, Marcus Hook.
Q. What is your occupation?
A. Seaman.
Q. How long have you resided in Marcus Hook?
A. About twenty-five years.
Q. Do you know the defendant, Edward Gibbs?
A. Yes, sir.
Q. Did you see him on or about the seventeenth of July, 1947?

A. Twice.

Q. Where were you residing on this date?

A. When I seen him I was on Market Street, down toward the river, about 8:30 or 9:00 o'clock.

Q. Did you come home that day?

A. No, sir.

Q. You first saw him that day about what time?

A. 8:30 or 9:00.

Q. Did you see him later that day?

A. Yes.

Q. Where did you see him the second time?

A. In a beer garden at Ninth and Green in Marcus Hook.

Q. When did you first discover the loss of the articles?

A. About noon, when I went home.

Q. From what you learned there, what did you do?

[fol. 25] A. I went up to the room. I didn't have a top shirt on. I just had on an athletic shirt. It was pretty hot that morning. I came in the house between a quarter of twelve and twelve o'clock and my mother said——

Q. Don't tell us that, what she said.

A. I had some business up town and I went in to put on another shirt. I said to mother, "You must have been real smart today, you put my radio and suitcase away." She said, "I didn't do anything but make your bed." Then she tells me about him being there.

Q. Did she know him before?

A. Yes.

Q. Then what did you do?

A. I got my shirt on and ran around to the chief of police, Mr. Miller, and explained. He got hold of Officer Fleming and we checked on the stuff.

Q. Did you find the stuff later?

A. Yes, sir.

Q. Where did you find it?

A. I don't know the number on Third Street but it was only a door or two from Dock Street.

Q. Did you identify the clothing?

A. Yes.

Q. What were the articles that were missing?

A. A radio, two flashlights, a pin-striped coat, a blue [fol. 26] serge suit, a camera. The radio he brought back and put it in there. Of course, I had shaving supplies.

Q. Who do you mean?

A. The man who operated the place.

Q. Did you see the defendant later that day?

A. Yes, sir.

Q. Where was he?

A. He was in the taproom between Second Street and Third Street, on Edgmont Avenue.

Q. What of your clothing did he have on?

A. My hat and watch.

Q. You took those off of his person?

A. The officer did.

Q. What happened to your seaman's papers?

A. After the hearing, we searched for them and they came out of the cell room with them. Where they found them I don't know.

Mr. Johnson: Do you want to ask any questions?

The Defendant: Yes, sir.

Cross-examination.

By the Defendant:

Q. You say you saw me twice that day, Jim?

A. Yes.

Q. The first time was——

[fol. 27] A. Between eight-thirty and nine o'clock.

Q. How about twenty minutes of seven when we were up in your room with five bottles of beer?

A. How many?

Q. Five.

A. I don't remember the beer.

Q. You are sure of that?

A. I am sure of that.

Q. Weren't there empty bottles in the room?

A. You can ask her that (indicating mother of witness). She cleans the room.

Q. I will. When I was leaving your place, didn't you ask me where I was going?

A. You came up to the room, Edward, but that was five-thirty, or long before that.

Q. You said you saw me twice that day, I want to straighten that out.

A. I saw you on the street and then in the taproom. I said, "You got a hat like mine," and you said, it was a colored fellows by the name of Roy Johnson.

Q. Are you sure of that?

A. Yes.

Q. Didn't you ask me when I was leaving your room, you asked me where I was going and I told you I would meet you at Fourth and Market Street?

A. I don't remember that.

[fol. 28] Q. I told you about the appointment I had with the man who was going to set me up in the driving business?

A. No.

Q. Didn't you take my hat off my head and put this on because mine was dirty?

A. No.

Q. What time did we meet at Pete's?

A. I was talking to Wilson Spence. You told me you had to go to Chester, you had three hundred dollars waiting for you under the GI Bill of Rights.

Q. I told you I had a disappointment on that.

A. You didn't mention that.

Q. In Pete's, do you remember who opened the place, Barney?

A. Barney was serving but I was talking to Wilson Spence.

Q. Before Barney and Spence, didn't you ask me to take this stuff up — Chester for you?

A. No.

Q. Didn't I tell you to go get it and bring it in while I had a haircut?

A. I never mentioned my stuff.

The Defendant: Can I have permission to ask him about another time he accused me until it was proven otherwise?

The Court: It has nothing to do with this. If you are [fol. 29] going into that, you might get something in here that you do not want in.

The Defendant: I will take my chances on that.

By the Defendant:

Q. Last fall, last year, didn't you wreck your own automobile and enter a complaint that I stole your car and wrecked it?

Mr. Johnson: Objected to.

The Court: Objection sustained. It has nothing to do with this case.

The Defendant: All right.

The Court: Anything further?
The Defendant: No.

Redirect examination.

By Mr. Johnson:

Q. Will you examine that wallet? Whose wallet is it?
A. Mine. It has my driver's license, seaman's papers, receipts and discharges as a seaman.
Q. Whose watch is that?
A. Mine.
Q. Was that in defendant's possession?
A. Yes.
Q. And he had your hat on?
[fol. 30] A. Yes.
Q. You didn't give him the watch?
A. No, sir.
Q. You didn't change hats with him either?
A. No, sir.

Mr. Johnson: That's all.

Mary E. Lafield, Sworn.

By the Clerk:

Q. Give your full name.
A. Mary E. Lafield.

By Mr. Johnson:

Q. Where do you live, Mrs. Lafield?
A. 710 Market Street, Marcus Hook.
Q. Are you the mother of James Blades?
A. I am.
Q. Did you see the defendant, Edward Gibbs, at your home on the seventeenth of July, 1947?
A. I sure did.
Q. You tell us what happened in your presence.
A. I had been upstairs cleaning. It was Thursday, the seventeenth. I came down the hall and had been sweeping

the steps. The dust blew in on the living room rug. I was brushing it out.

Q. What time of day?

A. About nine or quarter after nine.

[fol. 31] By the Court:

Q. In the morning?

A. Yes. I was sweeping the dust and I heard someone say, "Good morning, Mrs. Blades." That's what he called me. He was standing in the middle of the hall looking through the draperies. I said, "What do you want here?" He said, "You call Jim. I promised to call him at half past seven." I said, "Jim is not here." I said, "Eddy, get out of here. I am sweeping dust on you." Instead of getting out, he stood there. He said, "I would like to go to the bathroom." I said, "I don't like you to use it but don't stay long" because I had an old man about eighty years old and he had to go back and forth. He went upstairs and he goes and glances his head around in the rooms and I can see the bathroom from my hall door. I watched him come out of the bathroom. I swept the floor and he didn't come out and I go up and I pull all the doors to and then I step over in the other hall and I pull the other two doors to.

When I came back, he was standing in front of James' door watching it. I said, "So, Eddy, are you through in the bathroom?" He said, "Yes". He went downstairs and I said, "Get out and stay out." He went out on the pave-[fol. 32] ment but through my living room windows you can see me going out of the living room. When I saw he was on the pavement, I came on in the room, and said to my granddaughter, "How about having some lunch?" We set down to the table. We had some eggs and bacon. While there my granddaughter said, "I hear footsteps". I said, "The old man is getting up to go to the bathroom." I di n't pay any more account. I never thought of him any more.

James came home and he said, "You are very smart this morning, you moved my radio and what did you do with my clothes?" I said, "No, I put a clean cloth on your stand but I didn't move your radio. I put it back in place." The only thing I did, I took his green slacks and put them in his suitcase. He said, "I haven't any suitcase." I went

upstairs and investigated and I said, "Eddy Gibbs has them because he has been in the house this morning."

Mr. Johnson: Any questions?

Cross-examination.

By the Defendant:

Q. Mrs. Lafield, when I knocked on the door, you were sweeping in the living room?

A. You did not knock. My door was wide open. I was [fol. 33] looking right at you.

Q. Then I asked you where Jimmy was?

A. Yes.

Q. And I asked you if I could use the bathroom.

A. I wasn't in the bathroom. I stood at the door. You asked if you could call Jimmy and I told you Jimmy was up and gone. You said, "He gets up early." I said, "Well, he wants to."

Q. About the only word was you asked how Mom was?

A. I never asked for your mother. I positively did not.

Q. I told you he told me to come to Ninth and Green and I would locate him?

A. No, you certainly did not, and your family's name was never mentioned.

The Defendant: That's all.

Ernest Fleming, Sworn.

By the Clerk:

Q. What is your full name?

A. Ernest Fleming.

By Mr. Johnson:

Q. Mr. Fleming, what position do you occupy?

A. In the police department, in the Borough of Marcus Hook; also a constable.

Q. Did you arrest the defendant on or about the seven- [fol. 34] teenth of July, 1947?

A. I did.

Q. On a complaint?

A. I got a telephone call from the chief of police, Mr. Miller, to go up to Mrs. Lafield's to investigate a robbery

that occurred there. I went. The radio had been cut loose from the wall, the wire. I asked Jim, where was the suitcase. He said, the suitcase was by the bed. The clothes in the suitcase were in the closet and he had taken the clothes in the closet and put them in the suitcase. So I said, "We will go up to Chester and check on the pawnshops."

I went to three pawnshops and they gave me a description of Edward Gibbs, but they said they wouldn't take it. I went to Joe's and I also went to a place named James' at 141 West Third Street. Mr. Blades identified the articles taken. He said the man from whom he bought them had given the name of John Wilson, 1360 Fourth Street and there is no 1360 Fourth Street in Chester.

Q. Did you place the defendant under arrest?

A. I went to the Chester police and asked their permission to pick him up. They told me if I saw him to pick him up. I went to several taprooms and found him at a taproom on Edgmont Avenue, Hill's Grill, 323 Edgmont Avenue. He was sitting to a table; he was laying on the [fol. 35] table, with his head like this (indicating), and the watch was exposed and he had on this same straw hat. Mr. Blades identified both of them.

By the Court:

Q. When was this?

A. The seventeenth, about four p.m.

Q. July 17th?

A. Yes.

The Court: I understood the mother to say it was the nineteenth.

Mr. Johnson: Mrs. Lafield, did you say this was the seventeenth?

Mrs. Lafield: Yes.

By Mr. Johnson:

Q. Did you place him under arrest?

A. Yes.

Q. I show you a wallet containing papers.

A. I found that in the cell. We didn't search him when he was put in because he was pretty well intoxicated. He had this covered with a pair of black kid gloves.

Q. Was anyone else in the cell?

A. No, he was the only one.

By the Court:

Q. What was found in the cell?

A. The wallet.

[fol. 36] Q. What day?

A. The same day.

Q. The seventeenth?

A. Yes, sir.

Q. Where was the radio recovered?

A. In the pawnshop.

Q. It was in the pawn shop with the clothing?

A. Yes.

Q. Who operates the pawnshop?

A. A fellow named James.

Q. Did he describe a man like this defendant?

A. Yes. The defendant told me he had taken the things to the pawnshop and pawned them.

Q. Did he tell you how he got them?

A. No, he did not. He told me on the way to Marcus Hook that James had given them to him.

Q. James Blades?

A. Yes.

Mr. Johnson: Any questions?

Cross-examination:

By the Defendant:

Q. What kind of a bed do you have in the Marcus Hook jail?

A. An iron cot.

[fol. 37] Q. That wallet and gloves would be rough in my pocket, wouldn't they?

A. Yes.

Q. Isn't it natural to take them out of my pocket, the pocketbook and gloves, and lay them down?

A. Yes.

Q. It wasn't hard to find?

A. It was on the floor in the corner.

Q. It was in the middle of the bunk. It wasn't hid. It couldn't be hid.

A. It was in the darkest corner that you could get it with the gloves on it.

Q. The gloves and it were laying together?

A. The gloves were on top of it.

Q. Are you sure of that?

A. Yes.

Q. I laid it there and I know. You went in James' pawn shop?

A. Yes, and three others.

Q. I am not interested in the three others. I am interested in James'. You asked him to describe the party.

A. Yes.

Q. Was it one party or two entered James'?

A. One.

Q. There wasn't two of us?

[fol. 38] A. No, there was not.

Q. You didn't ask him concerning anyone else at all?

A. Yes, I did.

Q. That's funny. A fellow went in with me. We went in one place and he wouldn't take it because I told him it didn't belong to me—

Mr. Johnson: He can't testify now. He is just supposed to ask questions.

The Court: You can not testify yet. Later you can tesfify. Ask your questions now.

The Defendant: This all leads up to it.

The Court: You are only asking questions now. You may later take the stand and testify. If you do, you will open up to the district attorney the right to ask questions about certain things.

The Defendant: Yes, sir.

The Court: You may ask any questions you care to on cross-examination on what the district attorney has asked.

The Defendant: That is all if he didn't ask the man about the two of us being in there.

Mr. Johnson: There is one other witness I would like to call. He is not here. If you can recess for lunch, I would appreciate it.

[fol. 39] The Court: We will recess until a quarter of two.

(Recess for lunch.)

Afternoon Session

JAMES SILVERSTEIN, Sworn.

By the Clerk:

Q. Give your full name.
A. James Silverstein.

By Mr. Johnson:

Q. Mr. Silverstein, where do you live?
A. 141 West Third Street, Chester.
Q. Do you have a place of business in Chester?
A. Yes, sir.
Q. What kind of a place?
A. Used articles, shoes, clothing and house furnishings.
Q. Did you see this defendant on or about the seventeenth of July?
A. I did.
Q. Will you tell us in your own way what happened in your place of business?
A. This man came into my place and had a suitcase of used clothing, which he asked me to buy. I asked him what was his reason for getting rid of them. He said, he was [fol. 40] making a ship in Philadelphia and would have no use for the clothing.
Q. Is this the man who brought them there (indicating)?
A. Yes.

By the Court:

Q. What time was it?
A. July 17th, at 12:20 p.m.

By Mr. Johnson:

Q. Was anyone with him?
A. I don't know whether he had another man with him or not. A colored man walked in with him.
Q. This is the man who sold you the clothing?
A. Yes.
Q. Later this was identified as the clothing of Mr. Blades?
A. Yes.
Q. What did he sell you?
A. A radio and some old clothing.
Q. Was there a camera?

A. Yes.

Q. You didn't get the watch?

A. No.

Q. A radio, camera and a suitcase containing clothes?

A. Yes.

Q. What did you give him for them?

A. Eight dollars.

[fol. 41] Q. I show you a watch and ask you whether or not you saw that?

A. I saw it on his hand.

Q. At the time he sold the goods to you?

A. Yes

Mr. Johnson: Cross-examine.

Cross-examination.

By the Defendant:

Q. When I asked you to buy them, didn't I tell you they belonged to a sailor?

A. You told me you were the sailor and wanted to get rid of the articles.

Q. Was there one or two of us came into your place?

A. There was another fellow back of you. I don't know whether he was with you or not. I paid no attention to him.

The Defendant: That's all.

Mr. Johnson: I want to offer into evidence the wallet, the watch, which were identified and found—The watch was found in the possession of the defendant. This wallet, containing the papers of Mr. Blades, which was found in the jail cell that had been occupied by the defendant.

[fol. 42] The Court: What about the radio?

Mr. Johnson: It has been recovered and returned to the owner.

That is the commonwealth's case. We rest.

The Defendant: May I call the prosecutor back on the stand?

Mr. Johnson: He desires to call the prosecutor as his witness.

DEFENDANT'S EVIDENCE

JAMES NORRIS BLADES, Recalled.

By the Defendant:

Q. Mr. Blades, you met me at Ninth Street and told me if you weren't home to meet you at Ninth and Green at Sammy's.

A. I did not.

Q. When I came in Sammy's, we had a drink, a bottle of beer together?

A. I did not. I had a glass of beer but I got it with Russell Dowel.

Q. While we were talking at the sandwich bar you told me, there's the stuff sitting on the curb in the suitcase.

A. No.

[fol. 43] Q. You didn't yell and say, "Here comes your bus"—to hurry back?

A. No.

Q. Also you left the stuff right in the suitcase to be picked up?

A. I did not.

The Defendant: That's all.

The Court: Now then, Gibbs, you may, if you want to, take the stand and say anything you want to say, but I warn you if you do, if you have any record of any prior conviction, any felonies or any misdemeanors in the nature of what we call crimen falsi, the commonwealth may offer the record of any convictions you may have had. I am warning you in advance. You may, however, take the stand and testify or you may refuse to take the stand and if you do refuse to take the stand, the commonwealth and the court may not comment unfavorably about your failure to take the stand and testify. I want to warn you fully before you do take the stand.

Do you want to take the stand?

The Defendant: No, I don't have anything to say in court.

The Court: Do you have any witnesses you want to put on the stand?

[fol. 44] The Defendant: No, sir.

The Court: Do you wish to argue it to the jury? You may, if you want to.

The Defendant: No, sir; I don't believe so. I am not educated to talk to the people.

The Court: Do you waive your speech?

Mr. Johnson: I think I should make a few remarks to the jury.

(Address by Mr. Johnson to the jury.)

CHARGE OF THE COURT

The Court: Members of the jury, the defendant, Edward Gibbs, is indicted under one indictment with two counts, the first charging larceny, the second charging receiving stolen goods.

I suppose you withdraw the second count?

Mr. Johnson: Yes.

The Court: The second count is withdrawn, the charge of receiving stolen goods. So that will leave for your consideration the first count only, charging larceny.

As to larceny, under the law of Pennsylvania it is provided, whoever commits larceny, is guilty of felony. Larceny is the felonious taking and carrying away of the per-
[fol. 45] sonalty of another, and the fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner without his consent.

In order to sustain conviction for larceny there must be felonious taking and intention to deprive owner permanently of property and to convert it to the taker's own use.

Now, Mr. Johnson, at the outset of his remarks to this jury somewhat abbreviated that definition and said larceny is stealing. That is a rather short summary but the law as to larceny is as I have given it to you. It is the felonious taking and carrying away of the personalty of another, without the consent of the other and with intent to convert it to the taker's own use.

In this case, as in the other case this morning, the burden is on the commonwealth to convince you beyond a reasonable doubt of the defendant's guilt. He is presumed to be innocent until proven guilty beyond a reasonable doubt and that burden is on the commonwealth, as we charged you this morning.

I have already given you the definition of reasonable doubt, but I will summarize it in as short a manner as possible.

In an endeavor to determine from the evidence any [fol. 46] point essential to the commonwealth's case, if you hesitate as between two conclusions and find yourself mentally reluctant to reach a conclusion and after considering the evidence from all angles, you still hesitate, that is what the law terms a reasonable doubt and defendant is entitled to its benefit. In other words, when you are in that mental state of reluctancy to reach a conclusion, you must draw inferences and find facts the way most favorable to defendant. This is true whether the question in fact is a prime fact in the case, or only a minor matter, necessary to consider on the way to determine a prime fact, or whether it has to do with your final conclusion on the question of the guilt of defendant.

The reluctance to reach a conclusion must not be caused by sympathy or compassion for defendant or others who may be affected by a verdict against him; the reluctance must not come out of your heart but must be one which arises in your mind after consideration of all the evidence in the case.

You are not at any time to allow yourself to conjure up a doubt to avoid the performance of a disagreeable duty. You are not to be controlled by a hesitancy over the decision of a point which you would not consider a matter of doubt or hesitate to decide if it arose in a matter of importance [fol. 47] to yourself. Neither should you condemn unless you are convinced by the evidence that you would venture to act that same way in matters of importance where your own interests are involved.

The credibility of the witnesses is for you. We have given you the tests that you will apply and I am sure you heard them in the charge this morning. I will not repeat them at this time.

In this case, the defendant acts as his own lawyer, which he has a perfect right to do under the laws of this commonwealth. As he has presented no evidence of his own, except having called Mr. Blades and certain questions were asked Mr. Blades and certain answers made; that is the only evidence he presented.

The mere fact that the defendant does not take the stand and testify may not be used against him. I may not comment unfavorably about that and neither may the commonwealth's officer comment unfavorably and you will not take

any inference from the fact that he did not take the stand.

The commonwealth, in order to meet the burden placed upon it, called Mr. Blades to the stand. He testified certain articles of personal property were taken or missing from his bedroom on a certain date. I understood him to say July 19th, 1947, but it will be for you to decide what date [fol. 48] he said. He identified those articles as his, the radio, the two flashlights, a shirt, a camera, a blue serge suit, a watch, a pocketbook and a hat. Those are the articles I understood him to say. There may have been more. Whatever they were will be for you.

Mrs. Lafield, his mother, testified that on July 17th, 1947, the defendant was at the house between nine and nine-fifteen a.m.; that he first asked for Mr. Blades; that she told him he had gone out earlier; that he wanted to go upstairs to use the toilet; that she let him do that; that she went up and saw him looking at the bedroom door of Jim's room. That is Mr. Blades' room. She said she then told him to get out; that a little later on she heard footsteps on the stairs, she and some other person.

Officer Leonard Fleming testified that the same day, July 17th, 1947, he was called in on the case; that he looked for defendant and found him at some taproom; that his head was on the table, he was asleep or intoxicated and that he saw on his wrist at that time the wrist watch which Mr. Blades subsequently identified as his wrist watch. He said he placed this man in a cell and later the same day in the cell, back in a corner, he found a pocketbook under some gloves, which pocketbook later was identified by Mr. Blades as his pocketbook, containing his seaman's [fol. 49] papers, operators license and some other things. He also testified that the defendant told him, the officer, that he had taken the radio and some of these articles to a pawnshop and pawned them; told him where the pawnshop was located. He said that Mr. Blades had given him these things. Mr. Blades on the stand denied he had given him anything.

Mr. Silverstein, the second hand dealer or pawnshop owner, took the stand and said that on July 17th, 1947, at 12:20 p.m. the defendant came in his place with a suitcase full of used clothing, an old radio, a small camera and asked him to buy it. He said he did buy it and gave him

eight dollars. At the time he said he saw a wrist watch on defendant's arm, the wrist watch subsequently identified as Mr. Blades' watch. Mr. Silverstein asked defendant why he wanted to sell these articles and he said he was shipping out and wanted to get rid of the things.

The watch and wallet were offered in evidence.

Now, defendant called Mr. Blades and asked him whether he had told him to take the suitcase and do something with his clothing and he denied it; he denied he asked him to do anything with his clothing or that he had in any way given him any of these articles. That, in short, is the testimony, [fol. 50] on both sides.

As to the law in this matter, when a person is found in possession of recently stolen personal property, the mere fact that the person is found in possession of property which is recently stolen is sufficient for the jury to draw an inference that the person who has that possession, that property, was the thief or the person who committed larceny of the property. You may draw that inference from the fact a person is in possession of recently stolen property.

You will recall in this case that the evidence was the defendant had this property in his possession on July 17th and took it to a pawnshop, pawned some of it there and had the rest of it on his person, a wrist watch and pocketbook, on July 17th. There seems to be no doubt but that he did have possession of this property on that date.

The evidence by Mr. Blades was that this property was in his room at his mother's home at or shortly before this time. So, from that, if you are convinced beyond a reasonable doubt those were the facts, you could draw the inference the defendant did commit larceny of this property which was found in his possession on July 17th.

However, this case depends on the law of circumstantial evidence. In other words, no one actually saw the defend- [fol. 51] ant take this property. While they saw it in his possession later on, no one saw him in the act of taking it. Therefore, we do not have any evidence as to the actual taking and you are obliged to view this case through the circumstantial evidence law.

There are numerous decisions in Pennsylvania as to what the circumstantial evidence law is. I am going to give you the most recent one which we have. Here it is:

The requirement of the law is that in order to warrant a conviction (that is under circumstantial evidence where

there is only circumstantial evidence and not direct evidence) the facts and circumstances proved must be of such character as to produce a moral certainty of the guilt of the accused beyond any reasonable doubt—not that they need be absolutely incompatible with his innocence—and that doubt is for the jury unless the evidence be so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances.

I hope that is perfectly clear to you. I am sure from the looks on your faces, it is not, but that is what the law is.

[fol. 52] They also say that evidence sufficient to implicate an accused in a crime must be something more than evidence showing remote connection between the accused and the crime, or evidence that merely raises a suspicion of guilty intention. An accused is entitled to an acquittal if his guilt of the crime charged is not the only reasonable interpretation of which the facts adduced against him are susceptible. Guilt must be proved and not merely conjectured.

Now, there it is, members of the jury. I hope it is perfectly clear to you. I am not going to try to simplify it because I am afraid if I did, I would commit reversible error, and I am not going to try and revise it. I have given it to you in one of the most recent utterances and that is it.

That is something more than proving the defendant guilty beyond a reasonable doubt. I will go that far and say that to you. You must be convinced in accordance with the circumstantial evidence rule. The evidence of the commonwealth must be such as to comply with the circumstantial evidence rule in its degree of strength or proof when they depend on circumstantial evidence alone.

However, the law also is, where a person is found in possession of recently stolen property, if you are convinced a person has been found in possession of recently stolen [fol. 53] property, then from that fact alone you may draw the inference, if you are convinced beyond a reasonable doubt that such person was found in possession of recently stolen property, you may draw the conclusion that that person committed larceny of that property.

I could talk to you the rest of the afternoon and could not tell you much more than that. That is all I am going to say on the law in this case.

Now, there is just one further matter and that is as to costs. If you convict, you will have nothing to do with the costs. If you acquit, this being a charge of larceny, where the

value of the goods alleged to be stolen is less than a hundred dollars, you, the jury, if you acquit, shall determine by your verdict whether the county, the prosecutor or the defendant shall pay the costs or whether the same shall be apportioned between the prosecutor and the defendant and in what proportion, in the same manner as now provided by law in the case of misdemeanors.

I think you heard me say before what to do as to misdemeanors. I will repeat it. If you acquit and you should find from the evidence the value of the goods was less than one hundred dollars, then you would have the matter of costs to dispose of.

[fol. 54] In disposing of those costs, you may place them all on the prosecutor or prosecutrix, naming him or her, or all on the defendant, or all on the county of Delaware, or you may apportion them between the prosecutor or prosecutrix, naming him or her, and the defendant, in whatever proportion you see fit. You may not apportion them between the county and any other person.

You will notice on the back of the indictment the prosecutor's name is James Blades. You are not obliged to take that fact alone and name him as prosecutor. You may name some other person as prosecutor, if the evidence is sufficient to prove someone else is the prosecutor.

Any errors, omissions or corrections, Mr. Johnson?

Mr. Johnson: None, Your Honor.

The Court: Any errors, omissions or corrections that you want me to correct, Mr. Gibbs?

The Defendant: No, sir.

The Court: Take the case and dispose of it.

(Jury retires.)

(Jury returns to court room.)

[fol. 55] VERDICT

The Clerk: Members of the jury, have you agreed upon a verdict?

The Forelady: We have.

The Clerk: In the issue joined between the Commonwealth of Pennsylvania and Edward Gibbs, do you find him guilty in the manner and form in which he was indicted or do you find him not guilty?

The Forelady: Guilty.

The Clerk: Members of the jury, hearken to your verdict as the court hath it recorded. You do say in the issue joined between the Commonwealth of Pennsylvania and Edward Gibbs that you find the defendant guilty and so say you all.

The Jurors: We do.

Mr. Johnson: I think it would be interesting for the jury to know the type defendant we have. Your Honor, here is one we have marked up on the left; the important one.

EDWARD GIBBS, called.

By the Court:

Q. Gibbs, do you have anything to say before we impose sentence?

A. No, I guess not.

Q. How long have you been in jail?

A. Two months and a half.

[fol. 56] Q. What is the matter with you; why can't you keep out of trouble?

A. I don't know, sir.

Q. You don't know why you can't do it? What do you do, get drunk or something, or are you just ornery?

Mr. Johnson: Don't you think this man would be better if he were sent to the Eastern Penitentiary?

By the Court:

Q. Do you realize you can be put away for the rest of your life?

A. (No answer.)

The Court: It is a wonder the district attorney doesn't indict you for it. You can be indicted.

Mr. Johnson: If he comes back again, I will take it as my personal job to indict him.

The Court: In 1928 you were found guilty of burglary, larceny, receiving stolen goods, before Judge Fronefield—one to two years, county jail. In 1931, plead guilty to larceny—$100 fine and costs, one to two years, Judge MacDade. 1932 found guilty of larceny and receiving stolen goods, $50 fine and costs, six months to three years in

county jail, Judge Morrow. That is three. 1934 larceny, found guilty, $100 fine and costs, six months to three years in county jail; sentenced to one year in county jail for violation of parole; Judge Fronefield. That is four. 1937, [fol. 57] receiving stolen goods, $10 fine and costs, one to three years county jail, sentence suspended by Judge MacDade. That is five. 1938, larceny; found guilty, one and a half to three years county jail, Judge Crichton. I don't believe there is anyone you missed up to now. You were before me a year ago. No, just last March. You beat that, not guilty. Now, here you are the seventh time.

All I can do is give him two and a half to five years, if you don't want to indict these fourth offenders.

SENTENCE

On No. 417 September Sessions 1947, the sentence of the court is that you undergo imprisonment in the Eastern State Penitentiary at solitary confinement and hard labor for two and a half to five years and stand committed until this sentence be complied with. If I could give you life, I would do it.

Take him away.

(Testimony closed.)

[fol. 58] REPORTER'S CERTIFICATE

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of this cause and that this is a correct copy of same.

Margaret Fenix Cornwall, Official Court Stenographer

ORDER APPROVING RECORD OF PROCEEDINGS

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

(S.) Harold L. Ervin, Judge.

[fol. 58a-60] Lodged 10/16/47. J. G.

[fol. 61] (Acknowledgment of receipt of record omitted.)

[fol. 62] (Order of Supreme Court of the United States omitted.)

[fols. 63-64] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 65] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 127, Misc.

On petition for writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR WRIT OF CERTIORARI AND TRANSFERRING CASE TO APPELLATE DOCKET—November 15, 1948.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 418.

Endorsed on cover: Enter Petitioner pro se. In forma pauperis File No. 53,420 Pennsylvania, Supreme Court, Term No. 418, Edward Gibbs, Petitioner, vs. C. J. Burke, Warden, Eastern State Penitentiary, Philadelphia, Pennsylvania. Petition for writ of certiorari and exhibit thereto. Filed September 17, 1948. Term No. 418 O.T. 1948.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

418

No. 418

EDWARD GIBBS,

Petitioner,

vs.

C. J. BURKE, Warden, Eastern State Penitentiary,
Philadelphia, Pennsylvania

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

Frederick Bernays Wiener,
Counsel for Petitioner.

Alvin O. West,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 418

EDWARD GIBBS,

Petitioner,

vs.

C. J. BURKE, WARDEN, EASTERN STATE PENITENTIARY, PHILADELPHIA, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

Opinion Below

The Supreme Court of Pennsylvania wrote no opinion. Its order denying petitioner's original petition for a writ of *habeas corpus* appears at R. 5.

Jurisdiction

The order of the Supreme Court of Pennsylvania denying petitioner's original petition for a writ of *habeas corpus*

(R. 5) was entered on July 6, 1948. The petition for a writ of certiorari was filed September 17, 1948, and granted November 15, 1948. The jurisdiction of this Court rests upon 28 U. S. C. (1948 revision) 1257(3) and 2101(c).

Constitutional Provisions Involved

The VI Amendment provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

Section 1 of the XIV Amendment provides in pertinent part:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

Article I, Section 9 of the Constitution of Pennsylvania provides in pertinent part:

> "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel * * *; he cannot be compelled to give evidence against himself, * * *"

Questions Presented

1. Whether petitioner was denied due process of law in the circumstances of the present case, by being forced to trial on a charge of felony without counsel, where the record shows that the trial judge was hostile, made erroneous rulings on evidence to petitioner's prejudice, and (in violation of state law) substantially destroyed petitioner's privilege against self-incrimination.

2. Whether, in any event and apart from the circumstances of the present case, application of the standards whereby the VI Amendment has been interpreted (in defiance of its narrow historical meaning) to require the appointment of counsel for all indigent prisoners charged with felony, requires a like interpretation of the XIV Amendment, particularly in the light of the latter Amendment's recently expanded scope.

Statement

After an unsuccessful attempt in February, 1948, to file a petition for a writ of *habeas corpus* with the Court of Common Pleas for Montgomery County, Pennsylvania (R. 4), petitioner commenced the present proceeding by filing a petition for a writ of *habeas corpus* in the Supreme Court of Pennsylvania (R. 2-3).

The petition set forth his incarceration in the Eastern State Penitentiary at Graterford (par. 1, R. 2), his arrest, arraignment, trial and conviction in Delaware County on a charge of larceny (pars. 2-5, R. 2-3), and his sentence to a term of from two and one-half to five years (par. 7, R. 3). The petition alleged (par. 6, R. 3) that petitioner "was denied counsel and through ignorance of law and fact was forced to act as his own counsel," that (par. 8, R. 3) he "was denied his Constitutional Rights as set forth in the Ten Original Amendments, Article VI," and that his detention was in consequence illegal (par. 8-A, R. 3); he prayed for the allowance of a writ of *habeas corpus*.

This petition, signed *pro se*, was filed May 24, 1948 (R. 1, 2). Not until almost a month later, on June 21, was a rule to show cause directed to the Warden Burke, the respondent here (R. 1).

The respondent's answer, filed June 24, simply set forth petitioner's sentence (R. 5) and attached a copy of the com-

mitment signed by the clerk (R. 6); both documents, however, erroneously recited that petitioner had pleaded guilty to the charge against him.[1]

Thereafter, on July 2, 1948, the District Attorney for Delaware County filed another answer (R. 6-9). This admitted the formal allegations and the fact of trial and sentence. As to par. 6, relative to the denial of counsel, the District Attorney denied that petitioner was denied counsel; "on the contrary, it is averred that he appeared and acted as his own counsel, conducted his defense, cross-examined the Commonwealth's witnesses and fully acted as his own counsel" (R. 7).

The District Attorney's answer next set out and summarized the proceedings preliminary to trial and the substance of the evidence against him at the trial (R. 7-8). With respect to the allegation as to denial of counsel, he stated (R. 7, 8):

> "* * * The transcript of the notes of testimony does not disclose that the relator demanded counsel nor requested that counsel be appointed to represent him. * * *
>
> "* * * The issues here presented by the relator were before your Honorable Court in the matter of *Comth. ex rel. Uveges*, v. *Ashe, Warden*, and the opinion therein rendered, *161 Pa. Superior Ct. P. 58*, clearly holds that the Petition for Writ of Habeas Corpus cannot be made a substitute for appeal; that he was not denied his constitutional rights under the averments as set forth in his petition for said writ.
>
> "It is also averred by way of answer that the relator's examination of witnesses and questions asked during the course of the trial fully disclosed his familiarity with legal process in the criminal courts."

---

[1] Other and more authoritative papers show that he pleaded not guilty; see R. 13, 14 (docket entries); R. 19 (transcript of trial); R. 3 (par. 3 of habeas corpus petition); R. 7 (par. 3 of answer).

The District Attorney referred to petitioner's criminal record (R. 8) and attached a transcript thereof (R. 9-11); this showed eight convictions (including two for drunkenness) and nine acquittals, discharges, and no true bills. The District Attorney also attached to his answer a transcript of docket entries in the case which resulted in petitioner's current conviction (R. 12, 14), a copy of the indictment (R. 12-13), a record of the proceedings before the Justice of the Peace (the committing magistrate) (R. 15-18), and a transcript of the testimony at petitioner's trial (R. 19-39).

Petitioner had been indicted for the larceny of a suitcase containing clothing, a watch, a camera, and a radio, aggregating $121.50 in value, the property of one James Blades (R. 12-13), and had pleaded Not Guilty (R. 13, 14, 19).[2]

The testimony against petitioner may be summarized as follows:

James Blades testified that he was a seaman, residing in Marcus Hook, Pennsylvania, and that he had seen the petitioner twice on July 17, 1948. When Blades came home at noon, his suitcase and clothing were missing; on complaining to his mother, he was told that the petitioner had been there. Later when he checked with a police officer he found the clothing in a store, and he found the petitioner in a tap room wearing the missing hat and watch; Blades' seaman's papers came out of petitioner's cell room "after the hearing." (R. 19-21.)

Petitioner cross-examined the prosecuting witness in an attempt to establish that they had been drinking beer together earlier that day, that "the stuff" had been taken pursuant to an understanding between them, and that

[2] A second count, charging petitioner with receiving stolen goods (R. 13), was withdrawn by the prosecution before the case was submitted to the jury (R. 32).

Blades had previously accused petitioner of a criminal charge of which petitioner had been acquitted (R. 21-22). The court sustained an objection to the latter line of questioning, as follows (R. 22):

> "The Defendant: Can I have permission to ask him about another time he accused me until it was proven otherwise?
>
> "The Court: It has nothing to do with this. If you are going into that, you might get something in here that you do not want in.
>
> "The Defendant: I will take my chances on that.
>
> "By the Defendant:
>
> "Q. Last fall, last year, didn't you wreck your own automobile and enter a complaint that I stole your car and wrecked it?
>
> "Mr. Johnson: Objected to.
>
> "The Court: Objection sustained. It has nothing to do with this case.
>
> "The Defendant: All right."

On redirect examination, Blades testified that he did not give petitioner the watch, and that he did not change hats with him (R. 23).

Mrs. Lafield, Blades' mother, testified that she saw the petitioner in her house on Thursday morning, July 17, 1948; that he went upstairs, and that he stood in front of Blades' door; and that in time she saw petitioner on the pavement. Later, when Blades came home, he said to his mother, "You are very smart this morning, you moved my radio and what did you do with my clothes?" Mrs. Lafield said she did not move the radio, and only put his slacks in the suitcase. Blades said the suitcase was gone, whereupon his mother "went upstairs and investigated and I said 'Eddy Gibbs has them because he has been in the house this morning.'" (R. 23-24.)

Cross-examination of Mrs. Lafield by the petitioner brought an admission that petitioner had asked for Jimmy, together with denials that petitioner had knocked, or that he had transmitted a message from Blades, or that there had been mention of petitioner's mother (R. 25).

Constable Fleming of the Marcus Hook Police testified that he arrested the petitioner after getting a call from the Chief of Police "to go up to Mrs. Lafield's to investigate a robbery that occurred there." Fleming went there, saw where the radio and the suitcase had been, and then went to Chester to check up on the pawnshops. At the third one, a place named James at 141 West Third Street, "Mr. Blades identified the articles taken." (R. 25-26.) The radio and the clothing were recovered in the pawnshop (R. 27). Fleming and Blades then found petitioner in a tap room, with his head on the table, "and the watch was exposed and he had on this same straw hat. Mr. Blades identified both of them." Petitioner was arrested, but "we didn't search him when he was put in because he was pretty well intoxicated." Later the wallet, covered by a pair of black kid gloves, was found in the cell which petitioner occupied alone. (R. 26-27.)

Questions of Fleming by the court elicited the following (R. 27):

"Q. Who operates the pawnshop?

"A. A fellow named James.

"Q. Did he describe a man like this defendant?

"A. Yes. The defendant told me he had taken the things to the pawnshop and pawned them.

"Q. Did he tell you how he got them?

"A. No, he did not. He told me on the way to Marcus Hook that James had given them to him.

"Q. James Blades?

"A. Yes."

On cross-examination by the petitioner, Fleming admitted that the wallet and gloves would be uncomfortable in a pocket while lying on an iron cot, and that it would be natural to take them out; but he insisted that the wallet was in the darkest corner of the cell with the gloves on top of it (R. 27-28). Petitioner also attempted to ascertain whether the witness asked the pawnshop keeper if two persons were there. Petitioner's efforts at cross-examination were as follows (R. 28):

"Q. Was it one party or two entered James'?

"A. One.

"Q. There wasn't two of us?

"A. No, there was not.

"Q. You didn't ask him concerning anyone else at all?

"A. Yes, I did.

"Q. That's funny. A fellow went in with me. We went in one place and he wouldn't take it because I told him it didn't belong to me——

"Mr. Johnson: He can't testify now. He is just supposed to ask questions.

"The Court: You can not testify yet. Later you can testify. Ask your questions now.

"The Defendant: This all leads up to it.

"The Court: You are only asking questions now. You may later take the stand and testify. If you do, you will open up to the district attorney the right to ask questions about certain things.

"The Defendant: Yes, sir.

"The Court: You may ask any questions you care to on cross-examination on what the district attorney has asked.

"The Defendant: That is all if he didn't ask the man about the two of us being in there."

James Silverstein, a secondhand dealer of 141 West Third Street, Chester, testified that the petitioner sold him a suitcase of used clothing on July 17, saying he was

making a ship in Philadelphia and would have no use for the clothing. Petitioner and a colored man walked into the store together. Petitioner sold a radio, a camera, and a suitcase containing clothes, for all of which Silverstein paid eight dollars. The watch was on petitioner's hand at the time. (R. 29-30.)

On cross-examination, Silverstein denied that petitioner had said that the clothes belonged to a sailor; his testimony was that petitioner had said he was the sailor. The witness admitted that another man had come into his store with petitioner, but said he did not know whether this other man was with petitioner or not. (R. 30.)

The district attorney then offered the tangible effects in evidence as follows (R. 30):

> "Mr. Johnson: I want to offer into evidence the wallet, the watch, which were identified and found—The watch was found in the possession of the defendant. This wallet, containing the papers of Mr. Blades, which was found in the jail cell that had been occupied by the defendant.
>
> "The Court: What about the radio?
>
> "Mr. Johnson: It has been recovered and returned to the owner."

Petitioner thereupon recalled Blades for further questioning, a step which the district attorney characterized as "He desires to call the prosecutor as his witness" (R. 30).

On further cross-examination, Blades denied meeting the petitioner on an earlier occasion, denied drinking beer with him, denied a conversation with petitioner, and denied leaving "the stuff" in the suitcase to be picked up (R. 31).

Thereafter the following colloquy took place between the court and the petitioner (R. 31-32):

> "The Court: Now then, Gibbs, you may, if you want to, take the stand and say anything you want to say,

but I warn you if you do, if you have any record of any prior conviction, any felonies or any misdemeanors in the nature of what we call crimen falsi, the commonwealth may offer the record of any convictions you may have had. I am warning you in advance. You may, however, take the stand and testify or you may refuse to take the stand and if you do refuse to take the stand, the commonwealth and the court may not comment unfavorably about your failure to take the stand and testify. I want to warn you fully before you do take the stand.

"Do you want to take the stand?

"The Defendant: No, I don't have anything to say in court.

"The Court: Do you have any witnesses you want to put on the stand?

"The Defendant: No, sir.

"The Court: Do you wish to argue it to the jury? You may, if you want to.

"The Defendant: No, sir; I don't believe so. I am not educated to talk to the people.

"The Court: Do you waive your speech?

"Mr. Johnson: I think I should make a few remarks to the jury."

So far as the record shows, the foregoing statement by the court was made in the presence and in the hearing of the jury.

Thereupon, the district attorney addressed the jury (R. 32), and the court delivered its charge (R. 32-37). With respect to petitioner's representation, the court said (R. 33):

"In this case, the defendant acts as his own lawyer, which he has a perfect right to do under the laws of this commonwealth. As he has presented no evidence of his own, except having called Mr. Blades and certain questions were asked Mr. Blades and certain answers made; that is the only evidence he presented."

After the close of the court's charge, the following occurred (R. 37):

"[The Court:] Any errors, omissions or corrections, Mr. Johnson?

"Mr. Johnson: None, Your Honor.

"The Court: Any errors, omissions or corrections that you want me to correct, Mr. Gibbs?

"The Defendant: No, sir.

"The Court: Take the case and dispose of it."

The jury retired—for how long does not appear—and returned with a verdict of guilty. Sentence was imposed immediately, as follows (R. 38-39):

"Mr. Johnson: I think it would be interesting for the jury to know the type defendant we have. Your Honor, here is one we have marked up on the left; the important one.

"Edward Gibbs, called.

"By the Court:

"Q. Gibbs, do you have anything to say before we impose sentence?

"A. No, I guess not.

"Q. How long have you been in jail?

"A. Two months and a half.

"Q. What is the matter with you; why can't you keep out of trouble?

"A. I don't know, sir.

"Q. You don't know why you can't do it? What do you do, get drunk or so. ething, or are you just ornery?

"Mr. Johnson: Don't you think this man would be better if he were sent to the Eastern Penitentiary?

"By the Court:

"Q. Do you realize you can be put away for the rest of your life?

"A. (No answer.)

"The Court: It is a wonder the district attorney doesn't indict you for it. You can be indicted.

"Mr. Johnson: If he comes back again, I will take it as my personal job to indict him.

"The Court: In 1928 you were found guilty of burglary, larceny, receiving stolen goods, before Judge Fronefield—one to two years, county jail. In 1931, plead guilty to larceny—$100 fine and costs, one to two years, Judge MacDade. 1932 found guilty of larceny and receiving stolen goods, $50 fine and costs, six months to three years in county jail, Judge Morrow. That is three. 1934 larceny, found guilty, $100 fine and costs, six months to three years in county jail; sentenced to one year in county jail for violation of parole; Judge Fronefield. That is four. 1937, receiving stolen goods, $10 fine and costs, one to three years county jail, sentence suspended by Judge MacDade. That is five. 1938, larceny; found guilty, one and a half to three years county jail, Judge Crichton. I don't believe there is anyone you missed up to now. You were before me a year ago. No, just last March. You beat that, not guilty. Now, here you are the seventh time.

"All I can do is give him two and a half to five years, if you don't want to indict these fourth offenders.

"SENTENCE

"On No. 417 September Sessions 1947, the sentence of the court is that you undergo imprisonment in the Eastern State Penitentiary at solitary confinement and hard labor for two and a half to five years and stand committed until this sentence be complied with. If I could give you life, I would do it.

"Take him away."

The habeas corpus proceedings, detailed above, pp. 1, 3-5, followed, after which petitioner timely filed a petition for certiorari in this court.

In his manuscript petition for certiorari, also filed *pro se*, petitioner again contended that he was denied constitutional

rights by reason of the denial to him of counsel, relying on *Powell* v. *Alabama*, 287 U. S. 45, and *Townsend* v. *Burke*, 334 U. S. 736, and pointing out (Pet. par. 13), that this court's decision in the *Townsend* case antedated the decision of the court below in this case.

The material allegations of the petition for certiorari, here set out as a matter of convenience, were as follows:

> "2. * * * the grounds for the Writ being that the Petitioner was convicted without due process of law in that he was denied the constitutional right of counsel at his trial."
>
> "3. * * * just before the case was called Assistant District Attorney Johnson asked the Petitioner if he had a lawyer. The Petitioner replied that he had no funds wherewith to engage an attorney and that he wished to have one appointed to represent him. Mr. Johnson told Petitioner to take a seat which Petitioner did, hoping that an appointed lawyer would come to talk the case over with him.
>
> "4. However, no lawyer appeared and no counsel was appointed by the Court and the case was called a few minutes later.
>
> "5. The Petitioner did not know at the time that he had a right to counsel.
>
> "8. The Petitioner * * * did not know that he had the right to counsel and so the case proceeded with the control of the case completely in the hands of the Commonwealth."

Summary of Argument

I. Here and in the Court below, petitioner made the basic claim that, in violation of rights guaranteed him by the Federal Constitution, he had been denied counsel and forced to act as his own counsel. It is clear that Pennsylvania's denial of relief in such a situation rests upon its interpreta-

tion of the XIV Amendment, and also clear that, after denial, the case is properly before this Court for review. *Vreges v. Pennsylvania*, 335 U. S. 437.

II. A. Unlike most other right-to-counsel cases arising under the XIV Amendment, this one turns on the capacity of a layman to conduct a trial without the assistance of counsel, not simply on his competence to decide how he should plead; and the difference is a significant one. In many situations, true enough, there is more to pleading guilty or not guilty than the mere admission or denial of having done the act charged. But the accused can always defend himself at arraignment if he has the wit—and the composure—to persist in a plea of not guilty. It is far different at an actual trial. Persons with legal education, even lawyers of many years' standing at the bar, are frequently not qualified to try a case. *A fortiori* a layman is not, and to suggest that petitioner was so qualified simply because his prior criminal record indicates a modicum of familiarity with the procedure in criminal causes is equivalent to urging that a man is qualified to be a barber because he has frequently had his hair cut.

B. But it is not necessary to rest on generalized assertions; the record in this case convincingly demonstrates that petitioner was not competent to defend himself.

He was unable to ask questions properly. He was unable to recognize and hence to object to incompetent evidence; the record is replete with inadmissible hearsay. He lacked the education to address the jury. And he was unable to protect himself against being taken advantage of by prosecution and court alike.

Thus, it was error under Pennsylvania law to rule that the recall of Blades for further cross-examination made him petitioner's witness; it was error to prevent petitioner from attempting to impeach Blades for bias; and it was serious

error to force petitioner in effect to claim his privilege against self-incrimination before the jury by warning him, in the presence of the jury, that the record of his prior criminal convictions could be shown if he took the stand. This was a signal to the jury that petitioner was an individual with a bad record. In none of these instances would petitioner have been disadvantaged had he had counsel at his side to defend him.

C. Petitioner's inadequate attempts to defend, together with the hostile attitude of the trial court, establish that he was denied due process of law in being required to proceed without counsel.

For the judge here was far from exemplifying the traditional common law rule (of the days when persons accused of felony were not entitled to be heard by counsel), "that the judge shall be counsel for the prisoner." The court here never interceded in behalf of the prisoner, and was consistently hostile to him, not only in respect of the unfavorable rulings already detailed, but notably in connection with the sentencing. There the trial judge said, "If I could give you life, I would do it;" and, coming upon an acquittal in the course of reading petitioner's record, said, "You beat that, not guilty."

The foregoing circumstances bring the present case within the rule, reaffirmed at the last Term in *Townsend* v. *Burke*, 334 U. S. 736, 739, "that the disadvantage from absence of counsel, when aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced, does make out a violation of due process."

III. If the Court agrees with petitioner's contention, set out in the preceding paragraph, then there is no need to go farther. If, on the other hand, the Court finds no such showing of unfairness in the circumstances of this case,

then it is necessary to inquire whether the XIV Amendment, properly construed, nevertheless entitles petitioner to his release (or, at the very least, to a hearing on the allegations of his petition for *habeas corpus*). Petitioner does not propose to reargue *Betts* v. *Brady*, 316 U. S. 455, or *Bute* v. *Illinois*, 333 U. S. 640, which, he recognizes, appear to foreclose him. But there remain considerations of constitutional interpretation to which this Court's attention has not yet been drawn, and which, it is believed, should now be canvassed.

A. This Court's interpretation of the VI Amendment has rejected narrow historical tests in determining the proper scope of its protection for the individual.

Historically, the English law affirmatively denied counsel to a person charged with treason until 1695, and to one charged with felony until 1836. The VI Amendment must be read in the light of that background, and together with our own Act of 1790, which provided for the assignment of counsel only in capital cases. If the VI Amendment had been contemporaneously understood to require such appointment for indigent defendants in all cases of felony, the Act of 1790, passed while that Amendment was in process of ratification, would not have been so limited. By any strictly historical test, the decision in *Johnson* v. *Zerbst*, 304 U. S. 458, effected a marked departure from the earlier understanding of the meaning of the VI Amendment. It is abundantly clear that, in extending the protection of the VI Amendment to the helpless, the uneducated, and the indigent, this Court has conformed to modern standards of what a civilized society requires in the prosecution of crime, and has not felt itself fettered either by the shackles of historical consistency or by the harsher standards of an earlier age.

B. Conceding the soundness of *Adamson* v. *California*, 332 U. S. 46, and of *Bute* v. *Illinois*, 333 U. S. 640, insofar as

they reaffirm the traditional view that the XIV Amendment was not considered at the time of its adoption to include the specific guaranties of the first eight amendments, it still does not follow that the historical technique is necessarily the correct one.

Thus, as late as 1922, this Court said that the XIV Amendment imposed no obligation on the States with respect to freedom of speech. *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 538, 543. Five years later, the precise contrary was assumed, see *Gitlow* v. *New York*, 268 U. S. 652, 666, and now it is settled that the freedom of speech protected by the I Amendment is included within the liberty protected by the XIV Amendment. E.g., *Stromberg* v. *California*, 283 U. S. 359, 368; *Thornhill* v. *Alabama*, 310 U. S. 88, 95.

In the field of regulatory legislation, this Court rejected the notion of following historical precedents from earlier days in *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, where it struck down such legislation, nor did it rely on such precedents in *Nebbia* v. *New York*, 291 U. S. 502, a case which marked the beginning of the trend toward sustaining such enactments.

C. Insofar as the right to counsel is an element of Due Process of Law, as this Court first recognized it to be in *Powell* v. *Alabama*, 287 U. S. 45, 60, reliance on historical precedents was frankly disavowed. Why then should there be more sanctity in the concept of Due Process of Law as it prevailed in 1868?

The rule of *Betts* v. *Brady*, 316 U. S. 455, is not an absolute; it has been modified; and today both Michigan and Illinois have, under the impetus of decisions of this Court, provided for the appointment of counsel where no such provision had been made before. Thus the standard of what constitutes Due Process of Law with respect to the

assignment of counsel in these two states has been changed from the standards which prevailed there earlier, just as the standard of what is involved in the right to have the assistance of counsel in the federal courts changed between 1791 and 1938.

Due Process of Law is not something static which historians can recreate today after the manner of the archeologists who exhume fossilized matter to demonstrate how life went on ages ago. As Holmes said, "Historic continuity with the past is not a duty, it is only a necessity." Petitioner submits that there is no more reason to cling to historic continuity in this field than in any of the others just discussed. Today's meaning of the XIV Amendment as a conception of fundamental justice requires that no defendant accused of felony shall be forced to defend himself without the assistance of counsel against a prosecution conducted by a trained lawyer in any court of the land, state or federal. The essential inequality of the contest otherwise, regardless of the tribunal wherein it takes place, is, necessarily, a denial of what the present age considers fundamental justice.

ARGUMENT

I. Petitioner's Claim of Federal Right Was Properly Made Below and Is Properly Before This Court

Here and in the court below, petitioner made the basic claim that, in violation of rights guaranteed him by the Federal Constitution, he had been denied counsel and forced to act as his own counsel (R. 3; Pet. for Cert., pars. 2-5, 8, *supra*, p. 13).

The petition for habeas corpus was within the original jurisdiction of the Supreme Court of Pennsylvania. 17 Pa. Stat. Ann. § 48; *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41; *Commonwealth ex rel. Penland* v. *Ashe*, 341

Pa. 337. The circumstance that petitioner's rights were rested on the Sixth Amendment in the petition for habeas corpus, rather than on the Fourteenth, will of course be disregarded in view of his lack of legal learning, see *Price* v. *Johnston*, 334 U. S. 266, 292, and cases there cited; and certainly it did not mislead the law officers of the Commonwealth, who asserted "that he was not denied his constitutional rights under the averments as set forth in his petition" (R. 8), and who relied on the *Uveges* case in 161 Pa. Super. 58, which, after leave to appeal had been denied by the Supreme Court of Pennsylvania, 161 Pa. Super. xxv, was later reversed here. 335 U. S. 437. Moreover, it is clear that the Supreme Court of Pennsylvania rests its denial of relief in cases such as this one on an interpretation of the XIV Amendment. *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41. There the present Chief Justice of Pennsylvania, speaking for the court, said (344 Pa. at 48-49, 49-50):

> "The right guaranteed by the Pennsylvania Constitution (Art. 1, sec. 9) of an accused to be '*heard by counsel*' has never been challenged or abridged in this Commonwealth; the right of an accused to be *supplied with counsel when none is asked for* was never until recent years asserted in this Commonwealth. This court has never countenanced the idea that the accused in a criminal case when the charge is other than murder is being deprived of a constitutional right if he is not informed in advance of his trial that counsel will be assigned him upon request. * * *
>
> "The fact that the Supreme Court of Pennsylvania has never during its two and a half centuries of existence deemed it the duty of trial courts to provide (except in capital cases) counsel for accused persons where none was asked for strongly supports the postulate that the failure to provide counsel under the circumstances here present is *not* a denial of 'due process of law', a fundamental of Anglo-Saxon justice

which has been expressed in every constitution of this state and upheld by its judiciary since the American Union was formed." [Italics in original.]

Consequently the denial of the petition for habeas corpus by the Supreme Court of Pennsylvania adequately raised the Federal constitutional question as to denial of the right to counsel, and the case is properly here for review. *Uveges* v. *Pennsylvania*, 335 U. S. 437, 438-439.

While the *Uveges* case disposes of any question which might be raised as to the jurisdiction of this Court, it is proper to point out that, although the allegations of the petition for certiorari are somewhat more detailed than those in the petition for habeas corpus, no new matter was relied on or presented here which was not before the Supreme Court of Pennsylvania. And it is likewise proper to point out that the lapse of time between the two petitions has not resulted in any such improved, amended or emended allegations as have in the past been encountered in cases involving successive petitions seeking relief from confinement. *E.g.*, *Von Moltke* v. *Gillies*, 332 U. S. 708; *Price* v. *Johnston*, 334 U. S. 266.

II. Prior Decisions of This Court Establish That the Denial of Counsel Here, in the Circumstances of the Present Case, Amounted to a Deprivation of Due Process of Law.

A. *Unlike most other right-to-counsel cases arising under the XIV. Amendment, this one turns on the capacity of a layman to conduct a trial without the assistance of counsel, not simply his competence to decide how he should plead; and the difference is significant.*

With but a few exceptions, each of which is fully discussed immediately below, every case in this Court which

has involved a claim under the XIV Amendment arising out of an alleged denial of counsel has turned on the competence of a defendant to decide how he should plead; the stock pattern has been a plea of guilty induced by duress, or entered through ignorance, frequently by an accused of tender years or with little or no education. *Smith* v. *O'Grady*, 312 U. S. 329; *Williams* v. *Kaiser*, 323 U. S. 471; *Tomkins* v. *Missouri*, 323 U. S. 485; *House* v. *Mayo*, 324 U. S. 42; *White* v. *Ragen*, 324 U. S. 760; *Rice* v. *Olson*, 324 U. S. 786; *Canizio* v. *New York*, 327 U. S. 82; *Carter* v. *Illinois*, 329 U. S. 173; *De Meerleer* v. *Michigan*, 329 U. S. 663; *Foster* v. *Illinois*, 332 U. S. 134; *Gayes* v. *New York*, 332 U. S. 145; *Marino* v. *Ragen*, 332 U. S. 561; *Bute* v. *Illinois*, 333 U. S. 640; *Gryger* v. *Burke*, 334 U. S. 728; *Townsend* v. *Burke*, 334 U. S. 736; *Uveges* v. *Pennsylvania*, 335 U. S. 437.

Only four cases involving claims of denial of the right to counsel in circumstances alleged to violate the guaranty of Due Process of Law of the XIV Amendment were cases that actually went to trial. *Powell* v. *Alabama*, 287 U. S. 45; *Betts* v. *Brady*, 316 U. S. 455; *Hawk* v. *Olson*, 326 U. S. 271; *Wade* v. *Mayo*, 334 U. S. 672. The claim was sustained, at least to the extent of according a hearing, in all of these except *Betts* v. *Brady*, and there much was made of the circumstance that the question of the commission of the offense charged was not in issue. Mr. Justice Roberts, speaking for a majority of the Court, said (316 U. S. at 472):

> "In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant."

with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

It is no answer to suggest (cf. R. 7, 8; see also *Betts v. Brady*, 316 U. S. 455, 472) that the present petitioner's prior criminal record indicates some familiarity with legal procedure or of the practice in criminal causes. It might as well or as sensibly be urged that a man is qualified to be a barber because he has frequently had his hair cut. But there is no need to rest on generalized assertion; the record is here to show the extent and scope of petitioner's forensic abilities.

B. *The record in this case convincingly demonstrates that the petitioner was not competent to defend himself.*

It is only necessary to read the record of trial in this case to appreciate the petitioner's utter inability to conduct his own defense. He was unable to ask questions properly, he was unable to recognize and hence to object to incompetent evidence, he was unable to address the jury, and he was unable to protect himself against being taken advantage of by prosecution and court alike.

(i) Petitioner was unable to ask questions properly. Many of the "questions" put by petitioner to the prosecuting witness Blades were simply assertions of his own (R. 21-22, 31). The same is true in respect of the "questions" asked Mrs. Lafield (R. 25) and Constable Fleming (R. 27-28). In the case of the last witness, the district attorney objected that petitioner was testifying instead of asking questions, and the latter was warned accordingly by the trial judge (R. 28; colloquy quoted *supra*, p. 8).

(ii) Petitioner was unable to recognize and hence to object to incompetent evidence. The record is replete with inadmissible hearsay:

Blades: "Then she [witness's mother] tells me about him [petitioner] being there". (R. 20).

Mrs. Lafield: "* * * and I said 'Eddy Gibbs has them because he has been in the house this morning.'" (R. 25)

Constable Fleming: "I got a telephone call from the Chief of Police, Mr. Miller, to go up to Mrs. Lafield's to investigate a robbery that occurred there." (R. 25-26).

"I asked Jim, where was the suitcase. He said, the suitcase was by the bed." (R. 26)

"I went to three pawnshops and they gave me a description of Edward Gibbs * * *." (R. 26)

"Mr. Blades identified the articles taken." (R. 26)

"* * * the watch was exposed and he had on this same straw hat. Mr. Blades identified both of them." (R. 26)

"Q. Who operates the pawnshop?

"A. A fellow named James.

"Q. Did he describe a man like this defendant?

"A. Yes * * *" (R. 27)

Silverstein: "Q. Later this was identified as the clothing of Mr. Blades?"

"A. Yes." (R. 29)

moreover, unmistakably, suggests that the trial judge had prior, irregular, and extra-judicial knowledge of that fact.

But the incident which perhaps most clearly indicates the bias which animated the trial judge occurred in connection with the sentencing of petitioner, when the judge, after adjudging the maximum sentence permissible under the law (see 18 Pa. Stat. Ann. 4807; 19 *id.* 1057)[3], said (R. 39),

> "If I could give you life, I would do it."

Earlier, after reciting the convictions noted in petitioner's record (while omitting discharges and acquittals), the judge had said (R. 39),

> "You were before me a year ago. No, just last March. *You beat that, not guilty.*"

The italics in the foregoing quotation have been added; rarely is judicial bias so clearly demonstrated.

It is submitted that the unfairness and prejudice of the presiding judge which the present record reflects is sufficient, taken in conjunction with petitioner's obvious inability to defend, to bring this case within *Townsend* v. *Burke*, 334 U. S. 736. The question is not one of the petitioner's guilt or innocence of the charge of larceny, it is whether in the circumstances disclosed by the present record he has been accorded a fair trial consistent with those traditional safeguards which are embraced within the concept of Due Process of Law. That question is answered in the negative by decisions of this Court.

Thus, even in *Betts* v. *Brady*, 316 U. S. 455, this Court recognized that there might well be cases where an accused, tried without counsel, might be at a disadvantage because unrepresented. The Court said (316 U. S. at 472-473):

> "As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary intel.i-

[3] As the trial judge said (R. 39), "All I can do is to give him two and a half to five years, if you don't want to indict these fourth offenders."

gence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction. Only recently the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused, tried without counsel, had been handicapped by the lack of representation."

In *Wade* v. *Mayo*, 334 U. S. 672, where relief was granted, the findings of the habeas corpus court disclosed a situation not very different from this one (334 U. S. at 683):

"'It appears that petitioner, at the time of his trial in the Criminal Court of Record of Palm Beach, Florida, was eighteen years old, and though not wholly a stranger to the Court Room, having been convicted of prior offenses, was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself. It is admitted by the Judge who presided at petitioner's trial on March 6, 1945 that petitioner in open Court, before trial commenced, requested said Judge to appoint counsel for him, but the request was denied and petitioner placed on trial without counsel. . . . The denial of petitioner's request in the circumstances here involved constitutes a denial of due process, contrary to the 14th Amendment of the Federal Constitution, which renders void the judgment and commitment under which petitioner is held . . .'

"As the Circuit Court of Appeals pointed out, the evidence at the hearing before the District Court further showed that during the progress of the trial Wade (a) was advised by the trial judge of his right to challenge jurors and excuse as many as six without reason, a

right which he did not exercise; (b) was afforded an opportunity, which he accepted, to cross-examine state witnesses; (c) took the stand and testified in his own behalf; and (d) was offered the privilege of arguing his case to the jury but declined, as did the prosecuting attorney."

Two cases decided at the last Term, both from Pennsylvania as this one is, point up the distinction now in question. In *Gryger* v. *Burke*, 334 U. S. 728, 731, a majority of the Court was of opinion that "no exceptional circumstances" were present. But in the companion case of *Townsend* v. *Burke*, 334 U. S. 736, argued by the same counsel and decided at the same time, such circumstances were present; and the Court pointed out (334 U. S. at 739):

> "Only recently a majority of this Court reaffirmed that the due process clause of the Fourteenth Amendment does not prohibit a State from accepting a plea of guilty in a non-capital case from an uncounseled defendant. *Bute* v. *Illinois*, 333 U. S. 640. In that, and in earlier cases, we have indicated, however, that the disadvantage from absence of counsel, when aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced, does make out a case of violation of due process."

This petitioner was taken advantage of. This petitioner was prejudiced, by reason of lack of counsel; he was denied due process of law.

Nothing, it is submitted, turns on the circumstance that this petitioner was 34 years old (R. 9) and was sentenced to two and a half to five years whereas the petitioner Wade of *Wade* v. *Mayo*, 334 U. S. 672, was 17 years old and was sentenced to five years. Both lacked the capacity to defend themselves effectively. And if it be suggested that in the *Wade* case there was a finding of incompetence by the trier

of facts, see 334 U. S. at 683-684, whereas there is none here, then the short answer is that this petitioner should be granted a hearing where that fact can be determined. At the very least, he is entitled to an opportunity to establish his allegations, and to have a hearing where all the facts bearing on the denial to him of counsel may be developed. See *Hawk* v. *Olson*, 326 U. S. 271, 279.[4]

Here, as in *Townsend* v. *Burke*, 334 U. S. 736, 741, it is entirely possible that the presence of counsel might not have changed the result. But counsel would, by seasonable objections and by competent conduct of the defense, have forced adherence by prosecution and trial court to those requirements of fair play which the Due Process Clause of the XIV Amendment guarantees, and which in the absence of counsel this petitioner was unable to obtain for himself.

III. In Any Event, and Apart From the Particular Circumstances of This Case, Application of the Standards Whereby the VI Amendment Has Been Interpreted to Require the Appointment of Counsel for All Indigent Prisoners Charged With Felony Requires a Like Interpretation of the XIV Amendment, Particularly in the Light of That Amendment's Recently Expanded Scope.

If the Court holds that the circumstances of the present case reflect such an over-reaching of the petitioner by reason of his lack of legal representation as to bring the situation within the doctrine of *Townsend* v. *Burke*, 334 U. S. 736, then there is no need to go farther. If, on the other hand,

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[4] The suggestion of waiver which appears in par. 8 of the District Attorney's answer below (R. 7) might appropriately be canvassed at such a hearing. The right to counsel can of course be waived, provided the accused does so intelligently and understandingly after being fully advised of his rights. *Carter* v. *Illinois*, 329 U. S. 173; see *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441; cf. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269; *Von Moltke* v. *Gillies*, 332 U. S. 708.

In later cases, this aspect of the *Betts* decision has been stressed. Thus, in *Bute* v. *Illinois*, 333 U. S. 640, 676, the Court was at pains to point out that in *Betts* v. *Brady* "the commission or nature of the offense charged was not the issue because the defense was merely that of an alibi."

Up to now, no decision has focussed on the vital distinction, so far as a layman is concerned, between pleading and actually trying a case. True, this Court in many cases has emphasized the pitfalls in store for those not learned in the law when charged with crime and called upon to plead. See, e.g., *Rice* v. *Olson*, 324 U. S. 786, 789-791.

But the step from arraignment to trial is a long one, particularly for the layman. After all, insofar as the answer to the question "Guilty or not guilty?" reflects merely the doing of an act, any defendant who is *compos mentis* is qualified to give it. Any layman in the possession of his faculties knows whether, in fact, he hit his neighbor on the head, or whether he took the mailbags out of the post office, or whether he shot the deceased. On that basic issue he does not need counsel, he need only search his conscience.

Of course there are questions that go beyond the mere doing of the act charged, which will occur only to one trained in the law. Did the court have jurisdiction? See *Rice* v. *Olson*, 324 U. S. 786; cf. *Bowen* v. *Johnston*, 306 U. S. 19. Was the evidence against the accused lawfully obtained? Does the act charged constitute a crime? Cf. *Von Moltke* v. *Gillies*, 332 U. S. 708. Does a plea of guilty have consequences which extend beyond punishment for the particular crime charged? *Townsend* v. *Burke*, 334 U. S. 736. In such situations, as this Court has recognized, the fundamental notions of fairness inherent in the concept of Due Process require the assistance of counsel for the layman accused of crime who has not intelligently waived his rights.

Far greater difficulties are involved, however, when a person actually goes to trial. Every lawyer knows that the conduct of an actual trial requires a combination of skills. A trial lawyer needs, at a minimum, a knowledge of substantive law, a knowledge of the rules of evidence, a quick mind, a ready address, and a working knowledge of the processes of human psychology. And every lawyer knows that trial practice, of all fields of law, requires experience and training. Many law school graduates, just preparing to take their bar examinations, can write passable briefs on points of law. But, except in the rarest instances, they do not know how to try a case. And every lawyer likewise knows that thousands of eminent and respected practitioners, frequently of long standing at the bar, never have had and do not now have the qualities essential for an effective trial lawyer.

That being so, the layman is obviously at a disadvantage when he embarks upon so difficult an enterprise. He can defend himself adequately at the arraignment if he has the wit—and the composure—to persist in a plea of not guilty. But at a trial, mere denial is insufficient. The layman needs, but does not know substantive law. He needs to know, but actually knows nothing, of evidence or trial practice. He knows only that he is at a disadvantage; the assurance of even the glib person melts away; and of course those who lack schooling, or who are timid, or who reflect the reticence of the underprivileged, are at an utter loss. These are facts of common knowledge. Everyone who has ever been in a courtroom and has seen the undefended defendants shuffling past knows the truth of these assertions. And this Court is aware of them; *Powell* v. *Alabama*, 287 U. S. 45, 69, often quoted on this point, still bears repetition:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged

Another instance of incompetent testimony was the District Attorney's unsworn offer of proof, as follows (R. 30):

> "Mr. Johnson: I want to offer into evidence the wallet, the watch, which were identified and found—The watch was found in the possession of the defendant. This wallet, containing the papers of Mr. Blades, which was found in the jail cell that had been occupied by the defendant.
>
> "The Court: What about the radio?
>
> "Mr. Johnson: It has been recovered and returned to the owner."

(iii) Petitioner was unable to address the jury; the stark record is impressively eloquent on this point (R. 31-32):

> "The Court: Do you wish to argue it to the jury? You may, if you want to.
>
> "The Defendant: No, sir; I don't believe so. I am not educated to talk to the people."

(iv) Petitioner was unable to protect himself against being taken advantage of by prosecution and court alike.

(a) The prosecution urged (R. 30), and the court charged the jury (R. 33), that when petitioner recalled the prosecuting witness Blades for further cross-examination he made Blades his own witness. The practical effect of this ruling was prejudicial, as it made the prosecuting witness's testimony binding on petitioner, and prevented the use of leading questions in the further examination of that witness. *Commonwealth* v. *Reeves*, 267 Pa. 361, 362-363; *Commonwealth* v. *Eisenhower*, 181 Pa. 470, 476. And while of course the recall of a witness for further cross-examination is a matter lying within the discretion of the trial judge, see *Commonwealth* v. *Sladko*, 333 Pa. 1, 6, there is nothing in the present record to show why it should not have been permitted here. To have refused this privilege to a defendant unrepresented by counsel, when under the decisions it could properly have

been extended to the prosecution (*Coyle* v. *Commonwealth*, 104 Pa. 117, 131; *Commonwealth* v. *Eisenhower*, *supra*), amounted, it is submitted, to a clear abuse of discretion.

(b) As has been noted, pp. 5, 7, 9, above, petitioner was defending the present charge of larceny on the ground that he had taken the property in question pursuant to an understanding with the prosecuting witness (R. 22, 27). In those circumstances, it was clearly proper for petitioner to show on cross-examination that the witness had previously made a baseless criminal charge against him. *Commonwealth* v. *Farrell*, 187 Pa. 408, 423; see 3 Wigmore, *Evidence* (3d ed. 1940) sec. 950. Yet the trial judge prevented cross-examination designed to show just that (R. 22; see p. 6, *supra*).

(c) Finally, and this was even more markedly unfair, although the trial judge warned petitioner that his taking the stand would permit the Commonwealth to offer the record of his prior convictions (R. 31), that warning, so far as the record shows, was made in the presence and in the hearing of the jury. Its obvious effect was a signal, a signal to the jury that petitioner was an individual with a bad record and a prior history of crime, who because of that reason was unwilling to take the stand.

The question here is not, as in *Adamson* v. *California*, 332 U. S. 46, whether what was done at the trial in a situation where an accused was defended by counsel conformed to the standards of the Federal Constitution; the inquiry here is whether what was done to an accused unrepresented by counsel accorded him the rights and privileges which were his as a matter of state law, and which counsel would and could have obtained for him.

The situation reflected by the present record clearly contravened the standards for the protection of the privilege against self-incrimination which the Pennsylvania courts have laid down and enforced. For, by reason of the trial

judge's remarks in the presence of the jury, petitioner was in effect called upon to claim his constitutional rights before the jury; and under Pennsylvania law that was error. *Philadelphia* v. *Cline*, 158 Pa. Super. 179, 185; cf. *Commonwealth* v. *Valeroso*, 273 Pa. 213.

Thus, in *Philadelphia* v. *Cline*, 158 Pa. Super. 179, an action to recover statutory penalties, the defendants were called to testify as under cross-examination, which was proper only in a civil action. The Superior Court held, however, that in such a proceeding the defendant had the same constitutional privilege to refuse to testify against himself as if the action were brought in the criminal court; and, in reversing the judgment for the plaintiff, said (158 Pa. Super. at 185):

> "In those cases where a defendant has a privilege to refuse to testify, it is error to call upon him to take the stand in the presence of the jury and require him to claim his constitutional safeguards, as the refusal to answer is an eloquent incriminatory act and the spectacle produced, if permitted, would effectually emasculate the time-honored principles extending the haven of silence to one who may by the outcome of litigation be subjected to the imposition of a fine or forfeiture."

A comparable situation was presented in *Commonwealth* v. *Valeroso*, 273 Pa. 213, where the defendant, on trial for murder, was called upon in the presence of the jury to produce a certain letter, the contents of which would have tended to establish a motive for his commission of the crime. Defendant's conviction was reversed by the Supreme Court of Pennsylvania, which held that such a call on the defendant to produce the letter was violative of his constitutional privileges, and that the trial court erred in permitting the call to be made before the jury.

In none of the instances recited above would petitioner have been thus disadvantaged had he had counsel at his side to defend him.

C. Petitioner's inadequate attempts to defend, together with the hostile attitude of the trial judge, establish that he was denied due process of law in being required to proceed without counsel.

If, exemplifying the traditional English common law justification for denying counsel to one charged with crime (see 4 Bl. Comm. *355), "that the judge shall be counsel for the prisoner," the court in this case had acted in that capacity, it might perhaps be contended that petitioner could conceivably have had a fair trial. Cf. *Betts* v. *Brady*, 316 U. S. 455, 472, and 472 n. 31.

But the trial judge in this case assumed no such role. On the contrary, his actions and rulings reflect a consistent attitude of hostility towards the accused; at no point, so far as this record discloses, did he ever intercede on petitioner's behalf. Even on the matter of the prosecuting witness's recall for further questioning, which the District Attorney was quick to characterize as (R. 30) "He desires to call the prosecution as his witness," the trial judge made no move to suggest that petitioner was simply recalling the Commonwealth's witness for further cross-examination, a suggestion which any fair-minded judge would of course at once have made.

The ruling (*supra* pp. 6, 27) which prevented petitioner from impeaching the prosecuting witness for bias was error under Pennsylvania law, and again suggests no inclination to assist an accused acting *pro se;* and the same is true of the highly erroneous and prejudicial warning, in the presence of the jury, which all but said that petitioner had a long criminal record. The latter incident,

this Court is of the opinion that no such showing of fundamental unfairness has been made, then it becomes necessary to inquire whether the XIV Amendment, properly construed, nevertheless entitles petitioner to his release, or, at the very least, to a hearing on the allegations of his petition for *habeas corpus*.

Petitioner is of course fully aware that the broader question may appear to be foreclosed by the decisions of this Court in *Betts* v. *Brady*, 316 U. S. 455, and *Bute* v. *Illinois*, 333 U. S. 640. Petitioner does not intend to reargue the ground covered in the cases last cited. But examination of those opinions and of the briefs in the most recent cases involving claims of the denial of due process of law under the XIV Amendment by reason of the denial of counsel indicate that there are still considerations of constitutional interpretation which have not been canvassed, and to which it is believed that this Court's attention should be drawn. Briefly, it is petitioner's contention that, conceding the historical validity of the majority opinions in *Betts* v. *Brady*, 316 U. S. 455, and in *Bute* v. *Illinois*, 333 U. S. 640, it does not follow that the historical standard is the correct one. Petitioner will demonstrate that the historical standard has not been followed in the interpretation of the VI Amendment's guaranty of the right to counsel, that the interpretation of the scope of the XIV Amendment in other respects, notably in the field of freedom of speech and freedom of the press, has likewise departed from theretofore accepted historical analysis, and that reason and consistency alike require that the concept of due process of law be similarly interpreted, that it be expanded to conform to modern views, and that it should not be confined within the limitations of 1868 any more than the present interpretation of the VI Amendment has been straight-jacketed within the views of 1791.

A. *This Court's interpretation of the VI Amendment has rejected narrow historical tests in determining the proper scope of its protection for the individual accused of felony.*

In order to appreciate the scope of the VI Amendment at the time of its submission to the States in 1789 and at the time of its adoption in 1791, it is necessary to examine the English common law of that period.

Historically, of course, the harsh doctrine of the English common law was that an individual accused of treason or of felony was not entitled to have counsel appear for him or to represent him at his trial. The pages of the early volumes of Howell's *State Trials* are full of the earlier practice. The first relaxation of this essentially barbarous rule of law came with the Treason Act of 1695, which for the first time permitted a person accused of treason to enjoy the assistance of counsel in his defense.[5]

In cases of felony however, the old rule continued, and even the ultra conservative Blackstone bemoaned its unfairness. 4 Bl. Comm. *355. While in practice it was eventually relaxed to some extent, the English subject accused of felony was not entitled as a matter of right to be represented by counsel until 1836, nearly half a century after our own Constitutional Convention. St. 6 & 7 Will.

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[5] With respect to the right to counsel, the Treason Act of 1695, St. 7 & 8 Will. III, c. 3, provided: "That from and after the five and twentieth day of *March*, in the year of our Lord one thousand six hundred ninety six * * * every such person so accused and indicted, arraigned or tried for any such treason, as aforesaid, or for misprision of such treason, from and after the said time, shall be received and admitted to make his and their full defence, by counsel learned in the law, * * * and in case any person so accused or indicted shall desire counsel, the court before whom such person or persons shall be tried, or some judge of that court, shall and is hereby authorized and required, immediately, upon his or their request, to assign to such person and persons such and so many counsel, not exceeding two, as the person or persons shall desire, to whom such counsel shall have free access at all seasonable hours; any law or usage to the contrary notwithstanding."

IV, c. 114, § 1; 9 Holdsworth, *History of English Law*, p. 235; 1 Stephens, *History of the Criminal Law of England*, pp. 424-425.

Meanwhile, however, the practice in the American colonies early reflected a more liberal and enlightened rule. One by one, as the opinion of this Court in *Powell* v. *Alabama*, 287 U. S. 45, 61-65, shows, the American colonies permitted representation by counsel and provided for the appointment of counsel in capital cases. See e.g., Pennsylvania's Act of May 31, 1718, 19 Pa. Stat. Ann. 783. It is in the light of this background, English and American, that the VI Amendment must be viewed. That Amendment, having regard to the pre-existing law, guaranteed an American accused of felony in the federal courts the right to be represented by counsel, a right which was not his under the English common law. And the only circumstance in which he was entitled to have counsel provided for him by the community was if he was accused of a capital offense. The Act of April 30, 1790 (later R.S. 1034, 18 U.S.C. (1946 ed.) 563, and now 18 U.S.C. (1948 revision) 3005) well illustrates the Founders' understanding of the scope of the contemporaneously submitted amendment: That act provided:

> "• • • that every person so accused and indicted for any of the crimes aforesaid [treason and other capital offenses], shall also be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours; • • • "

If the VI Amendment required and was contemporaneously understood to require the appointment of counsel for indigent defendants in all cases of felony, why should

the Act of 1790 have been so limited? The short of the matter is that the broad interpretation which reads the VI Amendment as conferring an absolute right to the appointment of counsel (as distinguished from the privilege of providing counsel), an interpretation which dates from *Johnson* v. *Zerbst*, 304 U. S. 458, reaffirmed in *Walker* v. *Johnston*, 312 U. S. 275, and now accepted without substantial question, see Rule 44, F. R. Crim. P.; cf. *Von Moltke* v. *Gillies*, 332 U. S. 708, represents a substantial departure from the scope of that Amendment as if was understood in 1791 and for many years thereafter.

As late as 1932, this Court stated that the right to a fair hearing included the right to the aid of counsel when desired *and provided*. See *Powell* v. *Alabama*, 287 U. S. 45, 68, where the Court said:

> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired *and provided* by the party asserting the right." [Italics added.]

A little later, soon after the decision in *Johnson* v. *Zerbst*, 304 U. S. 458, a federal circuit judge of wide experience stated his understanding of the guarantee of right to counsel in the following terms (*Saylor* v. *Sanford*, 99 F. 2d 605, 607 (C. C. A. 5), *per* Sibley, J.):

> "It has never been understood that the federal courts were bound by the Constitution to furnish accused persons with counsel. A lawyer at the request of the court will represent a person unable to employ counsel, but I doubt that he ought or that the court could compel him to represent one able to employ counsel but unwilling. There are proposals pending before Congress to provide for a public defender, and for paying lawyers to defend indigent persons in some cases. All these arrangements for the defense of poor persons are acts of mercy, perhaps justice, but they are not re-

> quired by the constitutional provision and have never been supposed to be."

And a careful student of criminal procedure, now a United States District Judge, referred in 1944 to "the marked departure effected by the decision in *Johnson* v. *Zerbst*" (Holtzoff, *The Right of Counsel under the Sixth Amendment*, 20 N.Y.U.L.Q. Rev. 1, 10), and summed up the understanding of the bar as follows (20 N.Y.U.L.Q. Rev. at 7-8):

> "It is probably safe to say that from its adoption in 1791 until 1938, the right conferred on the accused by the Sixth Amendment 'to have the assistance of counsel for his defense' was generally understood as meaning that in the Federal courts the defendant in a criminal case was entitled to be represented by counsel retained by him. It was not assumed that this constitutional privilege comprised the right of a prisoner to have counsel assigned to him by the court if, for financial or other reasons, he was unable to retain counsel. The Sixth Amendment was not regarded as imposing on the trial judge in a Federal court the duty to appoint counsel for an indigent defendant."

It is thus abundantly clear that, in extending the protection of the VI Amendment to the helpless, to the uneducated, and to the indigent, this Court has conformed to modern standards of what a civilized society requires in the prosecution of crime and has not felt itself fettered either by the shackles of historical consistency or by the harsher standards of an earlier age.

B. *This Court's interpretation of the XIV Amendment in respects other than the one here in question has likewise rejected the historical approach.*

Petitioner here does not question the decisions of this Court in *Betts* v. *Brady*, 316 U. S. 455, in *Adamson* v. *Cali-*

fornia, 332 U. S. 46, or in *Bute* v. *Illinois*, 333 U. S. 640, insofar as they hold that, as a matter of history, the XIV Amendment was not considered at the time of its adoption in 1868 to include the specific guaranties of the first eight amendments. Petitioner is content to accept the traditional view on this point, which is set out in cases such as *Hurtado* v. *California*, 110 U. S. 516, *Twining* v. *New Jersey*, 211 U. S. 78, and *Palko* v. *Connecticut*, 302 U. S. 319.

But petitioner does urge the significance of the undoubted fact that this Court has in numerous respects steadily expanded the meaning of the XIV Amendment in a manner wholly consistent with accepted concepts of basic liberties and fundamental rights, but in disregard of purely historical techniques.

A suggestive example is the scope of the XIV Amendment's protection for freedom of speech. As late as 1922, this Court expressly stated that "the Constitution of the United States imposes upon the States no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence", and that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about 'freedom of speech' or the 'liberty of silence' * * *." *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 538, 543. Yet, just three years later, in *Gitlow* v. *New York*, 268 U. S. 652, 666, the Court said that "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

At present, of course, the matter does not rest on assumption; it is settled that the freedom of speech and the free-

dom of the press protected by the First Amendment are included within the liberty protected by the Fourteenth Amendment. E.g., *Stromberg* v. *California*, 283 U. S. 359, 368; *Near* v. *Minnesota*, 283 U. S. 697, 707; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244; *De Jonge* v. *Oregon*, 299 U. S. 353; *Lovell* v. *Griffin*, 303 U. S. 444, 450; *Schneider* v. *State*, 308 U. S. 147; *Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Marsh* v. *Alabama*, 326 U. S. 501, 511-512, (dissent).[6]

The scope of the Fourteenth Amendment with respect to the specific guarantees of others of the first eight amendments is in doubt. In *Francis* v. *Resweber*, 329 U. S. 459, 462, the Court assumed, without deciding, that violation of the principles of the V and VIII Amendments as to double jeopardy and cruel and unusual punishment would be violative of the due process clause of the XIV Amendment. Whether the guaranty of the IV Amendment against unreasonable searches and seizures is to be considered as incorporated into the due process clause of the XIV Amendment awaits decision in *Wolf* v. *Colorado*, Nos. 17-18, this Term, argued October 19, 1948.

The field of regulatory legislation affords another suggestive example of the rejection of the purely historical approach in considering the scope of the XIV Amendment. In *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, this Court struck down the Kansas Industrial Court Act, insofar as it permitted the fixing of wages in a packing plant, as being in conflict with the XIV Amendment; significantly enough, the Court rejected the notion that because such regulation had been well known in Colonial days, it was to be

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[6] For a review of the development of this trend through the *Gitlow* case, see Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 Harv. L. Rev. 431.

deemed the measure of modern police power. Chief Justice Taft, speaking for a unanimous Court, said (262 U. S. 522, 537):

> "It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

Of course the approach in regulatory cases is now substantially different, but here again it is significant that when *Nebbia* v. *New York*, 291 U. S. 502, reversed the earlier trend, it did not do so on the basis of historical precedents as to the scope of regulatory ordinances.

C. *The narrow confines of merely historical criteria should likewise be abandoned in interpreting the scope of the XIV Amendment's requirements as to representation by counsel.*

It is surely no novel suggestion to urge that the Due Process Clause of the XIV Amendment, insofar as it bears on the right to counsel, should be interpreted without meticulous regard to the historical boundaries within which that right, to the extent that it existed at all, was confined in the past, whatever be the appropriate datum point, whether 1789 or 1791 or 1868.

The first case in which this Court recognized that the denial of counsel could constitute a deprivation of the Due Process of Law guaranteed by the XIV Amendment involved a frank disavowal of precedents based solely on

history. *Powell* v. *Alabama*, 287 U. S. 45. As this Court there said (287 U. S. at 60):

> "If recognition of the right of a defendant charged with a felony to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted, there would be great difficulty in maintaining it as necessary to due process."

Yet the Court held that, in the circumstances of that case, the denial of effective counsel to the petitioner there amounted to a deprivation of due process of law in violation of the XIV Amendment. If, then, it was proper to look beyond the precise historical contours of the common law as it stood in 1789, in order to determine that question in *Powell* v. *Alabama*, why is there now more sanctity in the concept of due process of law as it is shown by accepted historical research to have prevailed in 1868? And why should historical consistency in the interpretation of the XIV Amendment's guaranty of counsel be adhered to when, as he has been shown above, pp. 35-38, no such consistency has shackled this Court's interpretation of the VI Amendment's guaranty of a similar right? These are questions which, it is submitted, are not answered by anything to be found in *Betts* v. *Brady*, 316 U. S. 455, or in *Bute* v. *Illinois*, 333 U. S. 640.

It is not without significance that the rule of *Betts* v. *Brady*, 316 U. S. 455, is not an absolute. It too has been broadened or, if one prefers, whittled away in particular cases. E.g., *De Meerleer* v. *Michigan*, 329 U. S. 663; *Wade* v. *Mayo*, 334 U. S. 672; *Townsend* v. *Burke*, 334 U. S. 736; *Uveges* v. *Pennsylvania*, 335 U. S. 437. And the effect of those cases has been felt far beyond the personal fortunes of the petitioners therein concerned. Thus, the Supreme Court of Michigan, no doubt shamed by the unanimous *per curiam* reversal in *De Meerleer* v. *Michigan*, 329 U. S. 663,

adopted within the year the following rule, effective September 1, 1947 (Rule No. 35A; 318 Mich. xxxix-xl):

"Criminal Procedure—Arraignment and Sentencing

"In every prosecution wherein the accused is charged with a felony the trial court shall conform to the following practice:

"Sec. 1. Arraignment. If the accused is not represented by counsel upon arraignment, before he is required to plead the court shall advise the accused that he is entitled to a trial by jury and to have counsel, and that in case he is financially unable to provide counsel the court will, if accused so requests, appoint counsel for him. If the accused states he will procure counsel or requests that counsel be appointed, a reasonable time thereafter shall be allowed for counsel to consult with the accused before his plea shall be taken.

"Sec. 2. Imposing sentence. If the accused pleads guilty, after such plea and before sentence the court shall inform the accused of the nature of the accusation and the consequence of his plea; and regardless of whether he is represented by counsel, the court shall examine the accused, not necessarily under oath, and as a condition of accepting the plea of guilty and imposing sentence shall ascertain that the plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. Unless the court determines that the plea of guilty was so made, it shall not be accepted.

"Sec. 3. Record. The trial court shall cause a stenographic record to be made and promptly transcribed of the proceedings had under sections 1 and 2 above, and shall certify over his signature thereto that the same is a true record of the proceedings had. Thereupon the record so made shall be filed with the clerk of court and become and be kept as a part of the record in the case. In any subsequent proceedings such record

shall be competent evidence of the facts and circumstances therein recorded.

"This rule is mandatory but failure to comply therewith shall not be considered jurisdictional."

And, following this Court's decision at the Term next after the *De Meerleer* case, in *Marino* v. *Ragen*, 332 U. S. 561, the latter a case where the Attorney General of Illinois confessed error, the Supreme Court of Illinois adopted a similar rule requiring the appointment of counsel for all indigent defendants charged with felony. See Snively, *The Right of an Accused to the Assistance of Counsel*, 32 J. Am. Jud. Soc. 111, 113. That rule, effective September 1, 1948, provides:

"In all criminal cases wherein the accused upon conviction shall, or may, be punished by imprisonment in the penitentiary, if, at the time of his arraignment, the accused is not represented by counsel, the court shall, before receiving, entering, or allowing the change of any plea to an indictment, advise the accused he has a right to be defended by counsel. If he desires counsel, and states under oath he is unable to employ such counsel, the court shall appoint competent counsel to represent him. The court shall not permit waiver of counsel, or a plea of guilty, by any person accused of a crime for which upon conviction, the punishment may be imprisonment in the penitentiary, unless the court finds from proceedings had in open court that the accused understands the nature of the charge against him, and the consequences thereof if found guilty; and understands he has a right to counsel, and understandingly waives such right. The inquiries of the court, and the answers of the defendant to determine whether the accused understands his rights to be represented by counsel, and comprehends the nature of the crime with which he is charged, and the punishment thereof fixed by law, shall be recited in, and become part of the common law record in the case;

> provided, in no case shall a plea of guilty be received or accepted from a minor under the age of eighteen years, unless represented by counsel."

The standard of what constitutes due process of law with respect to the assignment of counsel in these two states has thus been changed from the standards which prevailed there earlier, just as the standard of what is involved in the right to have the assistance of counsel in the federal courts changed between 1791 and 1938. It is not without significance that the two rules of court just set out above are in substance identical with Rule 44, F. R. Crim. P.:

> "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

In other words, under the impetus of the decisions of this Court, the concept of due process has expanded, so that, in more and more jurisdictions, cf. *Betts* v. *Brady*, 316 U. S. 455, 474, 477-480, the standard of what "due process" demands so far as legal assistance at trials is concerned has become identical with what "the right * * * to have the Assistance of Counsel for his defence" requires in the same situation. The VI Amendment is no longer interpreted today as it was in 1868; why then should the XIV Amendment be so interpreted?

Our whole constitutional history repels the notion that Due Process of Law is something static, something which the historians can recreate today precisely as it existed in the past, much as the archeologist who exhumes fossilized leaves and animals can demonstrate exactly how life went on ages ago. Quite to the contrary, the interpretation of "liberty" and "due process of law" in the XIV Amendment has been a living, growing, vital process, one which

throughout this Court's recent history has exemplified Tennyson's immortal vision of a land

> "Where Freedom slowly broadens down,
> "From precedent to precedent."

This Court's treatment of the XIV Amendment has, for the most part, paid heed to Holmes' prophetic warning, uttered more than half a century ago, that learning, though a very good thing, "is liable to lead us astray." *Learning and Science*, in *Collected Legal Papers*, p. 138. And Mr. Justice Holmes continued (pp. 138-139):

> "The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity."

There is no more reason to cling to historic continuity in the interpretation of the XIV Amendment insofar as the right to counsel is concerned than there was to adhere to historic continuity in the interpretation of the same Amendment insofar as freedom of speech is concerned, or than there was to cling to historic continuity in the interpretation of the VI Amendment's "right * * * to have the Assistance of Counsel in his defence."

Today's meaning of the XIV Amendment as "a conception of fundamental justice", see *Foster* v. *Illinois*, 332 U. S. 134, 136, requires that no defendant accused of felony shall be forced to defend himself without the assistance of counsel against a prosecution conducted by a trained law-

yer, in any court of the land, state or federal (unless of course the assistance of counsel be first understandingly waived). The essential inequality of the contest otherwise, regardless of the tribunal wherein it takes place, is, necessarily, a denial of what the present age considers fundamental justice.

Conclusion

The judgment below should be reversed.

Respectfully submitted.

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No. 418

IN THE

Supreme Court of the United States

October Term, 1948

EDWARD GIBBS,

Petitioner

v.

C. J. BURKE, WARDEN, EASTERN STATE PENITENTIARY, PHILADELPHIA, PENNSYLVANIA

On Writ of Certiorari to the Supreme Court of the State of Pennsylvania.

BRIEF CONTRA PETITIONER

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Jurisdiction

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BRIEF CONTRA PETITIONER

BRIEF OF COMMONWEALTH OF PENNSYLVANIA, DISTRICT ATTORNEY'S OFFICE, DELAWARE COUNTY

JURISDICTION

The record involves no jurisdictional questions. It is conceded that the matter is properly before this court for determination.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Section 1 of the Fourteenth Amendment provides in pertinent part:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

Article I, Section 9, of the Constitution of Pennsylvania provides:

> "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel * * *."

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Where a mature man, thirty-four years of age, with prior encounters with the criminal law which crystalized into a long criminal record of six separate felonies, is charged in the commission of his seventh felony, and thereupon appears in a State Court without the assistance of counsel, but actively engages in the trial of the case as counsel could have done, was it a denial of "due process" for the State Court not to have appointed counsel to represent him?

2. Where the record is barren of any averment in the pleadings that the accused was indigent, will the Court make such a finding merely because it is stated in counsel's brief?

3. Where the record is devoid of any request by an accused, charged in a State Court with having committed his seventh felony, that the Court appoint counsel to defend him, and the accused participates actively in the trial of his case, has he not waived his right to complain that he was not represented by counsel?

4. Was this defendant accorded a fair hearing?

COUNTER-STATEMENT OF THE CASE

On September 30, 1947, the petitioner, Edward Gibbs, was called to plead in the Court of Oyer and Terminer and General Jail Delivery and Quarter Sessions of the Peace in and for the County of Delaware, Commonwealth of Pennsylvania, to a single bill of indictment charging him with having committed the offense of Larceny, a felony, and Receiving Stolen Goods. A plea of not guilty was entered and the case proceeded to trial. The facts proven against the accused were in brief, that he had called at the home of one James Blades, on the morning of July 17th, 1947, that thereafter certain property of Blades was found missing, viz, a radio, two flashlights, a pin-striped coat, a blue serge suit, seamans papers, a camera, a wrist watch and hat; later the same day the accused was arrested, found wearing part of the clothing; the hat, the wrist watch, other of the goods, the camera, radio and suitcase containing the clothes were pawned and the accused identified as having pawned them and the balance were found in the cell occupied by him. The accused alleges that he was denied counsel. The record of the trial is devoid of any such request having been made. After conviction by a jury, the learned Trial Judge, reviewed the accused's prior criminal record and proceeded to impose sentence. No appeal was

taken from his conviction nor exceptions of any character taken as to the conduct of the trial. The prisoner now alleges that his trial, without benefit of counsel, is under the circumstances surrounding the trial, a violation of the requirements of "due process of law", and a denial of his Constitutional Rights.

Following an unsuccessful application to the Supreme Court of Pennsylvania for a writ of habeas corpus, the matter is now before the Supreme Court of the United States, on a writ of certiorari.

ARGUMENT

Owing to the very short period of time between the receipt of notice that the above entitled matter was to be heard on argument, April 20th, 1949, and the receipt of printed brief of petitioner's counsel, on April 8th, 1949, it has been impossible to examine in detail the decisions which will finally determine the issues before the court. Therefore, of necessity, this brief must be at best limited in scope and research.

The guilt of this petitioner of the crime of Larceny is beyond question and not in issue. The issue now to be determined is whether he was properly charged with the offense, tried, convicted and sentenced, under the laws of the Commonwealth of Pennsylvania and the Constitution of the United States, more particularly the portion of the Fourteenth Amendment which is as follows:

> "No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law".

Under the laws of the Commonwealth of Pennsylvania, it is only in capital cases that a court must ap-

point counsel to represent an accused at the time of his trial. Such has been the law of this Commonwealth, for over two centuries. By the Act of May 31st, 1718, 1 Sm. L. 105, sec 4, 19 Purdon Statutes, par. 783, it was required that "learned counsel" be assigned to the prisoners "upon all trials" of "capital crimes". This is also provided for in the Acts of March 22nd, 1907, P. L. 31, sec 1, 19 Purdon Statutes, par. 784. Hence, unless the appointment of counsel is mandatory as an absolute requirement under the Fourteenth Amendment to the Federal Constitution, none need have been appointed, even if requested by the accused when charged with Larceny only.

With the exception of trials of cases involving capital offenses, it has never been held that the failure of a court in the Commonwealth of Pennsylvania to appoint counsel to assist an accused at the time of trial is a denial of due process of law. *Com. ex rel. McGlinn v. Smith* (1942) 344 Pa. 34. The report of this case contains a full, comprehensive and historical review of the identical issue here presented. To what has been so lucidly expressed there is nothing to be added and as a guide in the presentation of cases of a similar character before the courts of initial jurisdiction likewise there is needed no additional instructions. On this phase of the issue the record conforms to the requirements therein set forth. Even taking into account the reasons relied upon by the Supreme Court of the United States, in *Uveges v. Com. of Pa.*, 69 S. Ct. 184

(1948), in reversing the Supreme Court of Pennsylvania, the basic facts of that case and the present case are very much different. The principal factor in the Uveges case was the youth of the accused; the alleged threats of dire consequences by the Assistant District Attorney if he dared to stand trial, that there would be a sentence to the Huntington Reformatory. Not one of these factors is present in the record of this case. The only thing that is presented, and this alone is alleged as the basis for complaint, viz, that the court did not appoint counsel to participate in the trial of the case on behalf of the accused.

As pointed out in the opinion of this Court, in *Uveges v. Com. of Pa.* (supra):

> "Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. See Bute v. People of Illinois, 333 U. S. 640, etc. Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See Betts v. Brady, 316 U. S. 455, 462, 62 S. Ct. 1252, 1256, 86 L. Ed. 1595. Where the gravity of the crime and other factors—

such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group hold that the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandingly made, justifies trial without counsel.

"The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment or the Fifth Amendment requires counsel for all persons charged with serious crimes, when necessary for their adequate defense, in order that such persons may be advised how to conduct their trial. The application of the rule varies as indicated in the preceding paragraph.

"Under either view of the requirements of due process, the facts in this case required the presence of counsel at petitioner's trial. He should not have been permitted to plead guilty without an offer of the advice of counsel in his situation. If the circumstances alleged in his petition are true, the accused was entitled to an advisor to help him handle his problems. Petitioner was young and inexperienced in the intricacies of criminal procedure when he pleaded guilty to crimes which

carried a maximum sentence of eighty years. There is an undenied allegation that he was never advised of his right to counsel. The record shows no attempt on the part of the court to make him understand the consequences of his plea. Whatever our decision might have been if the trial court had informed him of his rights and conscientiously had undertaken to perform the functions ordinarily entrusted to counsel, we conclude that the opportunity to have counsel in this case was a necessary element of a fair hearing."

"Reversed."

Counsel for petitioner have cited four cases involving claims of denial of the right to counsel in circumstances alleged to violate the guaranty of Due Process of Law of the Fourteenth Amendment and which went to trial, viz, *Powell v. Alabama*, 287 U. S. 45; *Betts v. Brady*, 316 U. S. 455; *Hawk v. Olson*, 326 U. S. 271; and *Wade v. Mayo*, 334 U. S. 672. These cases are easily distinguishable on their facts. In *Powell vs. Alabama*, a capital offense was involved, a hurried trial without investigation was had, and no opportunity to investigate was granted; the trial was conducted in a hostile atmosphere; the accused had no opportunity to employ counsel; there was no reasonable opportunity to defend the case; the crime was committed on March 25th, 1931 and the indictment was returned in the State Court on March 31st, and on the same date the defendants were arraigned and entered

pleas of not guilty. As will be pointed out later not one of those facts are present in this case.

In *Betts v. Brady* (supra), the accused was charged in the State of Maryland with the offense of robbery, and as an indigent requested the Court to appoint counsel for him. The practice there, as in Pennsylvania, is to appoint counsel in such cases only where a capital offense is involved, i. e., murder and rape. There, as here, the accused cross examined the State's witnesses. He was afforded, as here, an opportunity to take the witness stand and to examine his own witnesses. This Court upheld the denial of the writ of habeas corpus and affirmed the action of the Court of Appeals of Maryland which had denied, as here, the relief sought under such writ. A careful reading of this case would seem to determine the issue now presented to this Court for decision, and require a dismissal of the petition.

In the matter of *Hawk v. Olson*, 66 S. Ct. 116 (1945), the accused was charged with the crime of murder in the State of Nebraska. The petitioner alleged that his conviction was obtained by the use of perjured testimony knowingly used by the Prosecuting Officials and the Trial Court. This averment was not denied. He also alleged that on March 16, 1936, he was brought to Omaha from the Federal Penitentiary at Leavenworth, Kansas. He was held incommunicado in the Omaha jail except for a visit of fifteen minutes that evening by the Public Defender and his

Assistant. Those officials tried to intimidate the petitioner to plead guilty. He refused to do so, and the two officials left the petitioner and said they would have nothing to do with the Petitioner's trial scheduled for the following morning. The next day petitioner was arraigned and was read the information charging the murder to which he pleaded not guilty, and forthwith requested a continuance of twenty-four hours for the purpose of consulting counsel, examining the charge, subpoenaing witnesses and preparing a defense. The motion for a continuance was overruled and the case ordered to proceed to trial, and after two or three jurymen were called, a Public Defender and his Assistant stepped forward and entered the case, without ever having consulted the petitioner, and without ever having been assigned by the Trial Court to represent the accused. The case continued on the trial to the following morning, March 18th, 1936. These facts, the Court held, if true, violated the requirements of "Due Process" under the Fourteenth Amendment, and remanded the case for further proceedings. Not one single fact appearing in the *Hawk v. Olson* case is present here.

In *Wade v. Mayo* (supra), the facts were as follows: The accused was arrested on February 19, 1945, and charged with breaking and entering in Palm Beach County, Florida. He was held in jail until trial on March 14, 1945. At time of trial he requested the trial judge to appoint counsel alleging he was unable to employ one himself. The request was refused. The

jury convicted him on the same day and he was forthwith sentenced. One year later he filed a petition in the U. S. District Court for the Southern District of Florida alleging a refusal to appoint counsel for him at the trial was a deprivation of his constitutional right of due process of law. The accused was eighteen years of age, with a prior criminal record and familiar to some extent with Court procedure. The District Court determined the youth was inexperienced and incapable of adequately representing himself in a trial with no complicated legal questions. The court there stated (p. 684-5):

> "There are some individuals, who, *by reason of age, ignorance or mental capacity are incapable of representing themselves in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment. The Circuit Court of Appeals was therefore in error in reversing the District Court's judgment. It was also in error in assuming that the failure to appoint counsel in a non capital case in a state court is a denial of due process under the Fourteenth Amendment only if the law of the State requires such an appointment. To the extent that there is a constitutional right to counsel in this type of case it stems directly from the Fourteenth Amendment and not*

from State Statutes. Betts v. Brady, 316 U. S. 455. *Reversed.*"

We thus have four cases which directly raise the issues here presented on the question of "Due Process" under the Fourteenth Amendment. This defendant, thirty-seven years of age, with six prior pleas of guilty or convictions of felonies, arrested on July 17, 1947, held in jail on the charge of Larceny and Receiving Stolen Goods, until the time of his trial on September 30th, 1947, called for trial, and insofar as the record discloses never requested the appointment of counsel, neither asked for time to prepare his defense, if any he had, and at no time requested before being called for trial the subpoena of witnesses to aid him in presentation of a defense. In fact the petition is barren of any facts which would indicate he had any defense at all. In view of the record he had no defense, except that which was to be inferred from his questions to the victim, viz, that the latter had asked him to dispose of the goods, and to this it affirmatively appears that such was not the case at all. The petitioner has not alleged he was of tender years and the record itself shows he understood the nature of the offense and what he was called upon to answer. It required no searching of his conscience to determine his innocence or guilt. This was not a hurried trial. The petitioner knew from the date he was arrested, the same date on which the goods were stolen and on which he was apprehended with part of the stolen goods remaining in his possession, and identified immediately thereafter as the person who

had pawned the balance under an assumed name. His only basis of complaint is that under the circumstances he required the services of a lawyer to defend him and see that the requirements of "Due Process" were followed. Just what could even an able trial lawyer do for such a defendant? This defendant does not even allege that he was of tender years, ignorant or lacking in mental capacity. The circumstances of the case of *Powell v. Alabama* are entirely lacking. The case of *Betts v. Brady* (supra) supports the position of the Commonwealth of Pennsylvania, that his rights under the Fourteenth Amendment were fully protected and same conclusion is warranted under the authority of *Hawk v. Olson* and *Wade v. Mayo*, (supra). Duress in this case is totally lacking, the record shows no inducements to the defendant to plead either guilty or not guilty; no representations were made as to his sentence either as to the place of confinement or length of time he would receive. He does not even allege that he did not know what he was doing or that he did not understand or was misled.

Counsel for the petitioner further cite *Bute v. Illinois*, 333 U. S. 640, 68 S. Ct. 763, which together with *Betts v. Brady*, 316 U. S. 455 as controlling the broad question here involved, viz, that he was deprived of his rights under the "Due Process" clause of the Federal Constitution, Fourteenth Amendment. A reading of those cases, in light of the record of this case clearly establish that he was not. As a matter of fact, those cases fully support the contention that the defendant's

rights were fully protected and that his petition should now be dismissed.

Counsel for the petitioner also places much emphasis upon the expansion of the interpretation of the Fourteenth Amendment in determining the proper scope of its protection for the individual.

What is the practical effect of expanding such interpretation to a mandate to every court of initial jurisdiction that each and every defendant must be represented by counsel, no matter what the offense, felony, misdemeanor or summary offense. In *Com. of Pa. ex rel. McGlinn v. Smith*, 344 Pa. 41, 51, appears the following:

> "If this petition presents a case of 'apparent need for' the 'extraordinary remedy' of habeas corpus, it is reasonable to expect that our courts will soon be flooded with like petitions. In this State during the years 1939-1940 there were in our criminal courts 37,221 pleas of guilty, 10,755 convictions in which a jury trial was waived, and 6,104 convictions after a jury trial. In the same period there were 3,703 defendants sentenced to state prisons or reformatories and 18,449 sentenced to local jails.[4] If even 20% of the defendants who are here annually sentenced to prison were 'without benefit of counsel' and seek their discharge by writs of habeas corpus issuing out of the appellate

[4] This data is from the Chief of the Census Bureau, Department of Commerce.

courts, these two courts will annually have to hear and dispose of 1,107 such cases. Our courts should not for the reasons offered in this petition turn loose upon society the hundreds of convicts who were sent to prison after pleading guilty or being adjudged guilty by a jury, unless the law imperatively requires them to do so, and there is no such requirement."

Since this statistical data was informative, inquiry and study of our annual records has been made. In the Delaware County Court, for the year 1948, there were 1,055 defendants in criminal actions. Of these 833, entered pleas of guilty. Of those pleading guilty, six out of ten that were called for trial, were represented by counsel, either appointed or self retained. For the year 1947, there were 1073 defendants accused of crime, of whom 762 entered their pleas of guilty, of whom approximately 55% were represented by an attorney of their own choosing or were appointed by the court. Except in capital offenses it is not possible to determine whether defense counsel was appointed by the court.

If a clear cut decision is to be made on the representation of council in criminal cases other than capital offenses under state law, the realistic approach can be much better had through the state legislature. Procedural law requirements remotely established under the Fourteenth Amendment should not be so construed that the substance of criminal offenses be lost sight of and attention directed to the form by which it is

remedied. Upon this philosophy what was said in *Com. of Pa. ex rel. McGlinn v. Smith*, supra, is directly in point:

> "The root of the American system of government is found in the principle of duality of sovereignty.[5] The courts have been careful not to disturb the fundamental division of powers between nation and state. Neither nation nor state ever intended that either sovereignty's administration of its criminal laws should be reviewable by the courts of the other sovereignty except in those rare and extraordinary instances when a state criminal court denies a citizen that 'due process of law' guaranteed him by the Fourteenth Amendment. The United States Supreme Court has often declined in criminal cases, no matter how strong an appeal to its sense of justice the petition might make, to take any steps in the direction of 'breaking down the lines which separate the states and of compounding the American people into one common mass', a thing which Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 403, said: 'No political dreamer was ever wild enough to think of.'
>
> "In Knewel v. Egan, 268 U. S. 442, the United States Supreme Court in an opinion by Mr. Justice Stone (now Chief Justice) said: 'It is fundamental

[5] Brougham's "Political Philosophy", 2nd ed (London 1853), Part 3, p. 336.

that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on habeas corpus on the ground that no offense was charged or proved. It has been uniformly held by this Court that the sufficiency of an indictment cannot be reviewed in habeas corpus proceedings' (citing cases). In Frank v. Manguin, 237 U. S. 309, 326, the United States Supreme Court in an opinion by Justice Pitney said : 'If he (the prisoner) is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on habeas corpus * * * As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, id 'due process' in the constitutional sense' (citing cases).

"In Ex parte Tobias Watkins, 28 U. S. 193, 201, Chief Justice Marshall, speaking for the court said: 'The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment * * * The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be re-examined upon a writ of habeas corpus? This writ is, as has been said, in the nature of a writ of error, which brings up the body of the prisoner with the cause of commitment. The Court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and reexamine the charges on which it was rendered. A Judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it * * * It would be strange

if, under colour of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

"Recent decision by Federal courts show that they do not regard failure to provide counsel to defendants in criminal cases as a denial of 'due process of law'. In Saylor v. Sanford, Warden, 99 F. 2d 605, 606, supra (1938), it was held by the Fifth Circuit Court of Appeals that the court did not lose jurisdiction when it permitted the accused to be arraigned without assistance of counsel. In the concurring opinion in that case Circuit Judge Sibley said: 'Despite the breath of some of the language of the decision (Johnson v. Zerbst, 304 U. S. 458), the case ought not to be taken as establishing the doctrine that a court has no jurisdiction over an accused person who has no lawyer unless he expressly waives counsel or the court gets him one.' In Sanford, Warden, v. Robbins, 115 F. 2d 435 (1940), the Circuit Court of Appeals of the Fifth Circuit held that defendants who have been convicted without counsel in ordinary cases, though there was no express waiver of counsel, are not held under a void sentence. In that case Circuit Judge

Sibley said: 'Despite some of the language in Johnson v. Zerbst, we do not think it accurate to say that a duly organized court, undominated by mob spirit or any outside force (compare Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969), but proceeding in an orderly way, loses its jurisdiction to try the accused because it rules wrongly upon some question of law, even constitutional law. And we do not think counsel for the accused appointed by the court, where none has been secured by him, is indispensably necessary to the due organization of the court. Without regard to the grade or seriousness of crimes, the Fifth Amendment requires, if a person accused of crime procures counsel, that the court shall permit such counsel to represent and assist the accused, but it does not require the court to furnish counsel.' In that case the United States Supreme Court on March 10, 1941, found 'no ground upon which writ of certiorari should be issued' and denied the petition: 312 U. S. 697, 61 Supreme Court Reporter 737.

"When in the Sacco-Vanzetti case, Justice Holmes of the United States Supreme Court was petitioned for a writ of certiorari, he said: 'This is a case of a crime charged under state law and tried by a State Court. I have absolutely no authority as a Judge of the United States to meddle with it. If the proceedings were void in a legal sense, as when the forms of a trial are gone through

in a Court surrounded and invaded by an infuriated mob ready to lynch prisoner, counsel and jury if there is not a prompt conviction, in such a case no doubt I might issue a habeas corpus, not because I was a Judge of the United States, but simply as anyone having authority to issue the writ might do so, on the ground that a void proceeding was no warrant for the detention of the accused. No one who knows anything of the law would hold that the trial of Sacco and Vanzetti was a void proceeding. They might argue that it was voidable and ought to be set aside by those having power to do it, but until set aside, the proceeding must stand * * * The relation of the United States and the Courts of the United States to the States and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and can not be disposed of by a summary statement that justice requires me to cut red tape and to intervene.'

"Later when petitioned for a writ of habeas corpus in the same case, Justice Holmes said: 'I have no authority to issue it unless it appears that the Court had not jurisdiction of the case in a real sense so that no more than the form of a court was there. But I cannot think that prejudice on the part of the presiding judge, however strong, would deprive the Court of jurisdiction, that is of legal power to decide the case, and in my opinion

nothing short of a want of legal power to decide the case authorizes me to interfere in this summary way with the proceedings of the State Court': The Sacco-Vanzetti case, Vol. 5, pp. 5516 and 5532.

"Justice Black of this Court in Passmore Williamson's Case, 26 Pa. 9 (1855), expressed sound views on the issuance of the writ of habeas corpus. That was a case in which the complaint was that petitioner was unjustly held in custody under a commitment of the District Court of the United States and an application was made to the Supreme Court of Pennsylvania for a writ of habeas corpus. Justice Black in refusing the application said: "'There may be cases in which we ought to check usurpation of power by the federal courts. If one of them should presume to take out of our hands a prisoner convicted of contempt in this court, we would resist it by all proper and legal means. What we would not permit them to do against us we will not do against them. We must maintain the rights of the state and its courts; for to them alone can the people look for a competent administration of their domestic concerns; but we will do nothing to impair the constitutional vigour of the general government which is 'the sheet anchor of our peace at home and our safety abroad' * * * It is argued * * * that we cannot refuse the writ without a frightful violation of the petitioner's rights, no matter how

plainly it may appear on his own showing that he is held in custody for a just cause. * * * Can it be possible that the law and the courts are so completely under the control of their natural enemies that every class of offenders against the Union or the state, except traitors and felons, may be brought before us as often as they please, though we know beforehand, by their own admissions, that we cannot help but remand them immediately? If these questions must be answered in the affirmative, then we are compelled, against our will and contrary to our convictions of duty, to wage a constant warfare against the federal tribunals by firing off writs of habeas corpus upon them all the time. The punitive justice of the state would suffer still more seriously. The half of the Western Penitentiary would be before us at Philadelphia, and a similar proportion from Cherry Hill and Moyamensing would attend our sittings at Pittsburgh. To remand them would do very little good; for a new set of writs would bring them all back again. A sentence to solitary confinement would be a sentence that the convict should travel for a limited term up and down the state in company with the officers who might have him in charge. * * *' In his concurring opinion Justice Lowrie said: 'It is an essential element of judicial authority that it must be the judge of its own jurisdiction; and I do not know that this rule is peculiarly applicable to the higher courts. The lowest must

act upon it, subject to the higher social law that is involved in official subordination. Often the question may be erroneously decided. Often such decisions may result in great injury to the citizen, but it is the lot of government to err, because it is human, and a man of well-trained mind will think it no great hardship to submit to authority even in error. In the name of order, the country demands, and has the right to demand it. It is usual to say, even of foreign judgments, that, if pronounced by a competent tribunal, and carried into effect without our assistance, they are conclusive of the questions decided * * * Not that the United States is a foreign country, but that its courts belong to a different system from the state courts, and thus these respective authorities are, as authorities, foreign to each other. Each must respond to its own superiors; neither can call the other officially to account * * * Manufacture and repair constitutions and bills of right as we may; multiply checks and restrictions upon official functions as we may, we cannot shut out human error and its consequences, which are sometimes distressing—while we may carry our suspicions of government so far as to take away its real efficiency as a means of preserving social order; * * * In the name of the order which we represent and enforce, I decline any and every usurpation of power or control over the United States judiciary; it being a system collateral to ours, as complete and efficient

in its organization, and as legitimate and final an authority as any other. I concur in refusing the writ.'

"Every person's security against being deprived by state action, of life, liberty or property, without due process of law is under national protection since the Fourteenth Amendment was adopted on July 21, 1868, yet as Justice Bradley, speaking for the United States Supreme Court in Missouri v. Lewis (1879), 101 U. S. 22, 31, said: 'The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding.' Cooley in his edition of Story's 'Commentaries on the Constitution' said: (sec. 1947) 'No more under the Fourteenth Article than previously can the Federal government interfere with the mode prescribed for the trial of State offenses: whatever is established (by the State) will be due process of law, so that it be general and impartial in operation, and disregard no provision of Federal or State constitution.' The state is traditionally the protector of the lives, liberty and property of its own people and the courts of this Commonwealth have ever been vigilant in upholding that 'due

process of law' which 'means such an exertion of the power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs': Cooley's 'Constitutional Limitations', 8th ed., Vol. 2, p. 741.

"The administration of the criminal laws here as elsewhere is necessarily only an approximation toward that ideal of absolute justice which is said to be unattainable. In the long-established processes of our courts, we believe substantial justice is attained and we find in the record now before us no such impairment of the prisoner's constitutional rights as to require his release.

"The Commonwealth presented evidence of probative value against this accused and he testified freely in his own behalf. The case presented an issue of fact for the jury. Defendant did not ask for the assistance of counsel. With his penitentiary 'background' and his 'experience' in the criminal courts he must have known that professional assistance would have been given him upon request and therefore he must be deemed to have intelligently waived his 'right to be heard by counsel'.

"To discharge from custody this man who has been thrice convicted of felonies, upon the bare technicality that the trial judge did not inquire

whether he wished to have counsel assigned him would justify the reproach which William Howard Taft (later Chief Justice of the United States) expressed on June 26, 1905, as follows: 'When a court of highest authority interposes a bare technicality between a defendant and his just conviction,' it is not too much to charge some of the laxity in our administation of the criminal law to a proneness on the part of courts of last resort to find error and to reverse judgments of conviction.

"The writ is refused."

QUESTION

Q. Did this defendant receive a fair trial?

A. In reading the brief of the petitioner much stress is laid upon the remarks of the Court at the time sentence was imposed and several remarks made by the Court during the course of the trial. Upon these isolated instances he undertakes to erect a structure far beyond the importance of what the record discloses.

The petitioner's counsel has also expounded at great length the philosophy underlining the interpretation and operation of the Fourteenth Amendment. It would appear that tremendous labor has been spent in interpreting "due process" clause of the Fourteenth Amendment. Labored exposition of this clause, consisting of many thousands of words, has not added much by the way of guidance in its applicaton in every day administration of law. As a philosophy of "due process" clause is understood it only requires fair play, a deliberate action of a tribunal and its officers in an unprejudiced atmosphere giving due consideration of physical and mental limitations of all parties involved, a freedom from duress or beguiling practices. It is intended that only an honest search for truth be made; evidence adduced should be germane to the issue, properly acquired, and presented in an orderly manner so that well intentioned, honest and trained men can

properly safeguard human personal rights and rights of property. A cold typewritten record of a Court Stenographer setting forth the proceedings in a Court is far short of a true reflection of any trial and particularly a criminal trial. The demeanor of the Court, psychological atmosphere of the jury, the educational background of the jurors, the attitude of the District Attorney and innumerable other features of the proceeding taken together only, gives a true picture.

No law is self executing and in the final analysis the administration of a criminal law depends in a great measure upon the type of men who have the responsibility of its execution. The record in this case falls far short of giving a complete picture of what transpired or all the facts bearing upon the case. The accused and the prosecutor are both members of the negro race. They were of approximate equal intelligence and in the same walk of life. There was a theft by one of the approximate value of fifty dollars. The petitioner was found with the goods by the prosecutor, some in his own possession, some in a pawn shop, pawned by the accused under an assumed name, and the balance in the jail cell which had been occupied by the accused alone. This evidence was corroborated by the officers and in a measure by the prosecutor's mother. All of the facts were established within twenty-four hours, the theft, apprehension and finding of the accused with part of the goods then in his possession. That was the substance of the case. It appears in the trial record. The parties testifying did so to the best

of their ability to express themselves and no genius was required to understand these facts. The jury deliberated not more than ten minutes and the entire case consumed less than three quarters of an hour of time. It is recognized that a number of these facts are not of record.

From the entire record the following are exclusive of the Charge of the Court and the only remarks made by the Judge:

Mr. Johnson: He can't testify now. He is just supposed to ask questions.

The Court: You can not testify yet. Later you can testify. Ask your questions now.

The Defendant: This all leads up to it.

The Court: You are only asking questions now. You may later take the stand and testify. If you do, your will open up to the district attorney the right to ask questions about certain things.

The Defendant: Yes, sir.

The Court: You may ask any questions you care to on cross-examination on what the district attorney has asked.

The Defendant: That is al lif he didn't ask the man about the two of ous being in there.

* * * * * * *

The Court: Now the, Gibbs, you may, if you want to take the stand and say anything you want

to say, but I warn you if you do, if your have any record of any prior conviction, any felonies or any misdemeanors in the nature of what we call crimen falsi, the commonwealth may offer the record of any convictions you may have had. I am warning you in advance. You may, however, take the stand and testify or you may refuse to take the stand, the commonwealth and the court may not comment unfavorably about your failure to take the stand and testify. I want to warn you fully before you do take the stand.

Do you want to take the stand?

The Defendant: No, I don't have anything to say in Court.

The Court: Do you have any witnesses you want to put on the stand?

The Defendant: No, sir.

The Court: Do you wish to argue it to the jury? You may, if you want to.

The Defendant: No, sir; I don't believe so. I am not educated to talk to the people.

The Court: Do you waive your speech?

Mr. Johnson: I think I should make a few remarks to the jury.

What was done by the presiding Judge was for the purpose of helping the defendant and suggest to him that he should not make certain mistakes but there was

no interference, brow beating, inconsideration, or intemperate attitude displayed by the Court at any time.

True it is that there did creep into the record a certain amount of hearsay testimony but not one iota was prejudicial to the defendant in any degree. It will take far less time to read the entire record of the case than to read the petitioner's brief. The petitioner's counsel undertakes to stigmatize in his brief from a cold record, a judge who was hostile and lacking in fair mindedness and even going so far as to indicate a failure to do his duty. Such a conclusion is unwarranted by the facts of the case and the basis on which such contention rests is wholly wanting. The trial of this case proceeded in a very quiet, dignified manner, and in the friendliest of atmosphere. The trial Judge undertook to help the defendant during the course of his trial as much as he could with propriety without becoming a participant. There was nothing in the course of the conduct of the trial which could even faintly reflect that Judge Erwin was not fair minded in the matter. Of course, when the trial Judge came to the sentencing of the defendant he knew of his prior criminal record of six felonies within this jurisdiction. At the time of sentence the Court had before it a person who had been convicted of six felonies and was before it on the seventh felony charge and no doubt his remarks should be construed as an effort to induce the defendant to cease his criminal career. That does not convict the Judge of prejudice or facetious conduct. There comes a time in the practical administration of the law the Judges should undertake to impress upon habitual criminals that the law is not

entirely helpless and may take further steps against them. From one who actively participated in the trial as District Attorney, to read the remarks set forth in the petitioner's brief as characterizing the Judge's attitude in the case as one of consistent hostility is about as far from the truth of the case as it could be. Counsel's statement of prejudice unsupported by more than what has been cited in the record does not establish the fact nor the truth of the statement. It is submitted that something more than this should be present before a Court of initial jurisdiction is stigmatized as guilty of unlawful conduct.

The case of *Commonwealth ex rel. Townsend v. Burke*, 361 Pa. 35 (1949), has also been referred to as authority by the petitioner's counsel, to support the contention that the defendant's rights under the Fourteenth Amendment were violated. In the opinion dated January 11, 1949, the Supreme Court of the Commonwealth of Pennsylvania interpreted the decision of the Supreme Court of the United States. In that interpretation the Court said:

> "We are now unanimously of the opinion that the decision of the Supreme Court means, and was intended to mean, that the conduct of the trial judge in connection with his sentencing of the defendant, Townsend, constituted error of such a fundamentally harmful nature (considering the uncounseled position of the defendant) as to stigmatize the proceeding as lacking constitutional due process throughout and render it vitiated ab initio."

We will, therefore, revoke our order of May 26, 1947, denying the relator's petition for habeas corpus, and direct that the proceedings had in the Court of Oyer and Terminer of Philadelphia on June 5, 1945, with respect to the defendant, Townsend, be, in their entirety (including, specifically, the defendant's pleas and the sentences), vacated and set aside.

"That our conclusion to such effect fairly comports with the decision of the Supreme Court seems manifest. The fact that the defendant was without counsel did not, ipso facto, render the proceeding wanting in due process. The opinion for the Supreme Court in this very case expressly recognizes that this court has frequently held that the provision in our State Constitution, according defendants the right to be heard by counsel, does not require court assignment of counsel to defendants in non-capital cases who are without counsel: see e.g., Commonwealth ex rel. Withers v. Ashe, 350 Pa. 493, 39 A. 2d 610, and Commonwealth ex rel. McGlinn v. Smith, 344 Pa. 41, 24 A. 2d 1. Court assignment of counsel in Pennsylvania to destitute defendants in capital cases is provided for by statute: Act of March 22, 1907, P. L. 31; 19 PS § 784. As further pointed out in the opinion for the Supreme Court in this case, that court but recently reaffirmed that "the due process clause of the Fourteenth Amendment does not prohibit a State from accepting a plea of guilty in a non-capital

case from an uncounseled defendant. (Citing) Bute v. Illinois, 333 U.S. 640.

"What invalidated the proceeding in the instant case was the *improper conduct of the trial judge which consisted of his making facetious remarks, concerning the defendant's prospective penal servitude, in connection with the imposing of sentence, and of reading from a list containing five separate criminal charges against the defendant at former times when, actually, in three out of the five cited instances the charges had either been dismissed by the magistrate or the accused had been found not guilty.* The situation, thus judicially created, was pointedly appraised by Mr. Justice Jackson, speaking for the Supreme Court, in the following language: *'The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two other of the charges which the court recited against the defendant, he had also been found not guilty. Both the 1933 charge of larceny of an automobile, and the 1938 charge of entry to steal and larceny, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing court did not in-*

fluence the sentence which the prisoner is now serving.

"We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction (i.e., on the defendant's pleas) cannot stand.' (Emphasis supplied.)

"The fatal impairment of the proceedings of June 5, 1945, although not injected until the trial court began to sentence the defendant, was, in legal contemplation under the circumstances present, the result of the defendant's being without counsel; and the consequent disregard of the defendant's constitutional rights, so occurring, cannot be disjointed from the proceedings as a whole, including the court's acceptance of the defendant's contemporaneous pleas of guilty. For, once the lack of counsel became a denial of due process in the circumstances,

> the particular constitutional deficiency could not be lopped off and allocated to but one portion of the proceeding. Like a blood stream infection, which permeates the whole body, the harmful condition cannot be isolated to what appears to have been the incipient focal point of infection. There is the same reason, therefore, to set aside the defendant's pleas of guilty as there is to vacate the sentence. The convictions, even based on ostensibly voluntary pleas of guilty, cannot stand any more than can the sentence. Accordingly, the matter is not merely one of remanding the relator to the court below for sentencing".

The facts of that case are entirely different from the instant case. There was no facetiousness indulged in the instant case by the Court at any time and the record is devoid of anything which would remotely indicate such was the fact.

The record in this case consists of twenty-one and a half pages of double space typewritten matter. The balance of the record contains the Charge of the Court and the sentencing of the defendant, the entire record consisting of thirty-five pages.

The Court did not at any time prior to the return of the conviction of the defendant by the Jury indulge in any conduct or make any remarks which could be construed as facetious. What he did was to undertake to help the defendant prevent him from making mistakes in the conduct of his own trial. In this respect the

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complain about his counsel's inability to obtain the desired result, namely an acquittal of the offense committed through the channel of habeas corpus and allegations of his being deprived of his rights under "Due Process".

CONCLUSION

Under the foregoing authorities it is submitted that the application of the petitioner be denied.

Respectfully submitted,

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